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No.

In the Supreme Court

OF THE

United States

SERGIUS BRYNER and FRANCIS BRYNER, et al.
Petitioners,

vs.

SECURITY PACIFIC NATIONAL BANK, COMMERCIAL BANK OF SAN FRANCISCO, CAPITAL RESERVE LEASING CORPORATION, C.I.T. CORPORATION, and LEASCO CAPITAL EQUIPMENT CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a magistrate, lacking the essential attributes of an Article III judge, may exercise the judicial powers of the United States and enter judgment in a case over which the federal court asserts subject matter jurisdiction.

2. Whether a prevailing counterclaimant, entitled to an award of contractual attorneys fees on a counterclaim, can override the "American Rule" and Congress and obtain attorneys fees that encompass not only the counterclaim but also the defense of Securities Act and other claims.

(a) Whether petitioners were denied due process of law when the magistrate aborted a scheduled hearing and entered judgment awarding respondent banks and leasing companies $2 million dollars in attorneys fees and non-statutory costs, without a hearing of any kind whatsoever.

3. Whether jury verdicts were coerced

by the magistrate's call for numerical division, followed by two supplemental Allen-type charges.

4. Whether the magistrate took the necessary steps to assure that jury verdicts were unanimous and whether, having refused to make appropriate inquiries of a questioning juror, the magistrate should have granted the application for a post-trial hearing on that issue.

5. Whether the discovery at trial that material evidence had been reconstructed or destroyed should have been the subject of sanctions that: (a) would have affected the entry of judgment, (b) would have denied an award of attorneys fees and non-statutory costs, and (c) should have been considered on the merits before entry of judgment.

6. Whether the uncontradicted facts establish a prima facie violation of the Glass-Steagall Act.

(a) Whether the trial court should have

granted respondent banks directed verdict motion.

(b) Whether a private party can assert violation of the Act as an affirmative defense.

PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Plaintiff and cross-defendant/appellants and petitioners herein: Sergius and Francis Bryner, Calvin and Jacqueline Benton, Clarence and Louise Copeland, Howard Daniel, Alvin and Catherine Dill, John Duff, John and Patricia Dumars, Gaar Edwards, Martin and Ruth Fish, Maurice and Ellen Fox, Gary and Karen Fry, Jared and Elsie Haight, Roy and Mary Hamaji, Robert and Betty Harrington, Ronald and Marcia Haug, Richard Jackson, Pacific Wood Preserving Corporation, Shoge and Janet Kimura, Leo and Osie Lawrence, Bernard and Barbara Lewis, Eugene and Mary Olga Liston, Lowell and Joan Lundell,

William and Marsha McKee, Philip and Rina Milano, John and Margaret Moylan, James and Nancy Ouye, Robert and Maria Pappas, Kent and Claire Pearson, Robert and Alberta Roth, Walden and Lois Alldrin, Billy Joe and Virginia Purviance, Randol and Betty Purviance.

Defendant and cross-claimant/appellees and respondents herein: Commercial Bank of San Francisco, Security Pacific National Bank, Capital Reserve Leasing Corporation, C.I.T. Corporation, Leasco Capital Equipment Corporation and defendant/appellees John Smith, William Sarsfield, Robert Temp, Alaine C. Temp, and Richard Freeman.

The individual defendant/appellees are not included as respondents in this petition.

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LEASCO CAPITAL EQUIPMENT CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners respectfully file this Petition For Writ of Certiorari.

OPINIONS AND ORDERS OF COURTS BELOW

Judgments favoring respondent banks and leasing companies were entered September 18, 1981, nunc pro tunc June 23, 1981. During the pendency of the appeal from those judgments, on August 5, 1984,

the Ninth Circuit held 28 U.S.C. 636(c), of the Magistrates Act to be unconstitutional. Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983), en banc hearing granted. On August 8, 1983, based upon Pacemaker, petitioners moved to vacate the district court judgments for lack of subject matter jurisdiction. On October 31, 1983, the Ninth Circuit, by memorandum (unpublished), affirmed the judgments below and thereafter stayed decision on the motion to vacate pending a decision by the court sitting en banc in Pacemaker. A petition for rehearing and suggestion for rehearing en banc was denied on January 17, 1984. On February 16, 1984, the Ninth Circuit en banc reversed the Pacemaker panel (725 F.2d 537), and on March 6, 1984, petitioners' motion to vacate judgments was denied. (See Appendix for the above-referred to orders and judgments.)

JURISDICTION

The dates of the Ninth Circuit judgments or decrees sought to be reviewed are October 31, 1983, and March 6, 1984.. The Order denying rehearing on the appeal was entered January 17, 1984. The jurisdiction of this Court to review the judgments by writ of certiorari is 28 U.S.C. §2101(c), and U.S.Sup.Ct.Rule 20.4.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows: "nor shall any person...be deprived of...property...without due process of law...".

28 U.S.C. §636(c)(1) provides, inter alia, that with the consent of the parties, a magistrate may exercise the jurisdiction of the federal court and enter judgment in any civil matter. (Appendix)

F.R.Civ.P. 60(b)(3) provides that the court may relieve a party from a final

judgment, order or proceeding for the fraud, misrepresentation, or other misconduct of an adverse party.

F.R.Civ.P. 48 requires that receipt of less than unanimous verdicts must be by stipulation of the parties.

F.R.Civ.P. 26(e)(2) provides:

> A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

12 U.S.C. §§24 and 378 provide, inter alia, that national banks shall exercise only "such incidental powers as shall be necessary to carry on the business of banking" and precludes commercial banks from directly or indirectly dealing in securities whether in the form of issuing, selling, underwriting or participating in such

activities. (Appendix)

California Civil Code §1636 provides that "a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

STATEMENT OF THE CASE

District Court Jurisdiction: Federal jurisdiction is based upon petitioners' (appellants below) claims of multiple violations of federal securities laws, the National Banking Act, and the doctrine of pendent jurisdiction. The counterclaims of respondent banks and leasing companies are for unpaid balances, interest and attorneys fees on promissory notes and equipment leases that facilitated unlawful sale of unregistered securities.

* * *

Background of the Case: Petitioners were investors in a program that collapsed despite multi-million dollar financing made possible by the respondent banks and leasing companies. The respondent banks, using the device of highly leveraged loans, linked the success of their business acquisition program to the sale of unregistered non-exempt securities. Petitioners were solicited by the promoters (D.M.S.) and referred to the respondent banks. Ordinarily, the petitioners were not customers of the banks.

The facts are unprecedented. There is no reported case in which a national bank has teamed up with sellers of unregistered securities to obtain new business. The offer of 100% leverage, through unsecured loans prearranged by the promoters was a major inducement for investors to enter the program. The banks, through the conduit of promoter-recruited California borrowers,

provided capitalization for Texas operators and they utilized promoters' income projections to structure investment loans.

Loan proceeds, earmarked for the Texas operators, were disbursed from ad hoc special accounts. Interest income to the banks was maximized through a "roll-over" feature, resulting in prepayment of 4-year notes after one year and applying the "rule of 78s."

The program's major financing was offered by respondent Security Pacific National Bank, which provided loan proceeds totaling over $9.5 million dollars. In their defense, the banks contended that these were "ordinary commercial loans." At mid-trial it was learned that original loan files (which were the most basic proof of whether these were "ordinary commercial loans") had either been destroyed or disassembled and new files created for litigation purposes. Similarly, it was learned that

all the originals of the most important historical document in the bank file (credit commitment reports) had been destroyed and that the bank had altered and used paste-ups to create copies and obscure the destruction of originals.

In late 1974, with the program was in a state of collapse, respondent Commercial Bank of San Francisco, employing the identical officers who had operated the program at Security Pacific, attempted to salvage the program by providing fresh capital in the form of new loans to old investors and separate loans to the promoters/operators.

The respondent equipment leasing companies had contracted to deliver equipment to the site of oil and gas wells, but their records do not establish delivery of such equipment, or even its existence. Their counterclaims hinged on the efficacy of "receipts" executed by absentee investors who relied upon representations of the

promoters. The fate of the promoter/operators of this program is set out in United States v. Freeman, 619 F.2d 1112 (5th Cir. 1980), cert.denied 450 U.S. 910 (1981).

* * *

Reference to A Magistrate: Complaints and cross-complaints were separately filed in 1976 and 1977 and, thereafter, consolidated for trial. Prior to the 1979 enactment of 28 U.S.C. §636(c), the parties consented to reference to a magistrate pursuant to §636(b). Before trial commenced on July 28, 1980, the parties consented to the magistrate's exercise of jurisdiction under 636(c).

* * *

Destruction of Material Evidence: In the course of trial, it was learned that respondent Security Pacific National Bank had destroyed, altered, and otherwise mishandled material evidence. The bank's misconduct was a subject of post-trial motions for

judgment n.o.v. and new trial. F.R.Civ.P. 59, 60(b)(3). ER 50, §V. The motions were denied without a hearing on the merits. ER 75, 78. The Court of Appeals memorandum (Appendix) is silent on this point although it is squarely raised. See Appendix, p.1, infra, Issue No. 3.

The first disclosure of the banks' misconduct was made on February 5, 1981, seven months after the commencement of trial when the bank's lead counsel told the court "original files...don't exist any more", and that the bank had "created a file" purporting to consolidate documents retrieved from throughout the bank. RT 15714-15. Nine of sixteen main office files had been destroyed and of the seven produced, financial documents were missing. The remaining loan files had been disassembled and placed in a litigation file with other documents characterized after the trial as "reconstructed" files.

ER 59. All were passed off as individual loan files kept by the bank in the ordinary course of business.

Original "credit commitment reports," the historical document setting out "what actually happened" had been destroyed and replaced with photocopies. RT 17070, 18237.

The bank altered original credit commitment reports by whiting out, masking, and utilizing "paste-ups", and then photocopying the paste-up, a practice that makes the photocopy appear to be a copy of an original instrument, when it is not. RT 15529-30.

From early 1976, Security Pacific was aware that its participation in the investment program was a subject of civil litigation and SEC scrutiny. As early as 1973, the bank foresaw litigation. Pl.Ex.95-2.

In 1976, when the first lawsuit was filed, a vice president took charge of collecting the original loan files (RT 17064) "and gathering bank documents

for production to attorneys for the plaintiffs." ER 59, RT 14988, 17065-70.

Over half the Main Office files could not be produced during the 1980-81 trial because they had been totally destroyed and of the seven produced, important financial documents were missing. Insofar as the San Mateo branch files were concerned, Security Pacific, instead of maintaining those files in their original condition, disassembled and "reconstructed" them. ER 59, RT 17069. "We put this file together on January 12, 1976." RT 17073. The bank did this by removing the documents from the loan file and creating a new file that purported to include documents from other departments of the bank without inventorying what was in the original file, thereby making it impossible to know whether the "reconstructed" file contained everything that was in the original loan file. RT 17074-5.

Throughout pre-trial and discovery proceedings and for seven months into trial, Security Pacific talked about individual loan files without disclosing that, before they had been produced for inspection and copying, they had been "reconstructed." On February 15, 1979, (CR 940) the bank's attorney marked three credit commitment reports as exhibits and, forestalling a call for the original, stated:

> I shall represent to you that those were photocopied in our office from the branch credit file...of Security Pacific. CR 940 at pp.659-660.

There were no originals. RT 17076, 18237.

In a request for production of documents, filed August 17, 1976, petitioners demanded production, inter alia, of complete loan files, etc. The bank's response was that production would be burdensome but there was no acknowledgement that "complete loan files" did not exist.

In answers to interrogatories dated

November 23, 1977, (CR 164) the bank repeatedly referred plaintiffs to "individual loan files of the borrowers" for answers to specific requests for information.

An exchange of interrogatories in September, 1977, generated the following Security Pacific responses:

> Security Pacific has produced the individual loan files of the borrowers...the answers to these interrogatories may be derived or ascertained from an examination of the loan files... (Answer to Interrogatory 1, 11/23/77, CR 164)

When the bank was asked to identify and describe all documents received as a result of the promoters efforts, the bank responded by stating "see the individual loan files" (Answer to 4E 11/23/77, CR 164) Similarly, when the bank was asked to identify and describe the purpose of each loan, the bank responded "see the individual loan files". (Interrog. Answer 5B, 11/23/77, CR 164)

Thus, the bank consistently parried

requests for specific information with the rejoinder that petitioner should "see the individual loan files which have been produced for inspection and copying", but never bothered, until four years later, late in the trial, to tell anyone that "the individual loan files" had been tampered with and that the files produced had not been maintained in the ordinary course of business. Rather, they were assembled for a self-serving litigation purpose. RT 17069.

On July 2, 1980, more than three weeks prior to commencement of trial, separate trial subpoenas duces tecum were served on Security Pacific's main office and the San Mateo branch. CR 1275, 1346. The subpoenas required production at trial of "all loan files", etc., and the subpoena footnoted that summaries would be acceptable: "except as to the complete original loan files." But, it was not until

February 5, 1981, seven months into trial and five years after the first lawsuit had been filed that Security Pacific acknowledged that "complete original loan files" no longer existed and the bank had "created a file" which it had referred to throughout as "the individual loan files." RT 15714-5.

In affidavits filed in response to petitioners' post-trial motions on this point, respondent bank equated "original loan files" with what they only then began to refer to as reconstructed or Special Asset Department files. The bank told the court that plaintiffs' counsel:

> Were given an opportunity to inspect all original loan files which could be located for each plaintiff, i.e., the files as reconstructed by Security Pacific's special assets department when it took over the plaintiffs' loans from the lending branches. (Cross Decl. ER 59, ¶2, emphasis added.)

In petitioners' post-trial motion

raising this point they attach several declarations, including their former lead counsel who superintended the discovery process. He averred:

> Throughout my participation as an attorney of record in this litigation, the bank maintained in its defense to alleged securities law violations that it had made ordinary commercial loans based upon the personal income and net worth of individual borrowers and not to enhance the capitalization of the mineral lease program. The loan files purportedly confirmed this position. Had I, as attorney for plaintiffs, known that the loan files had been 'reconstructed' by Security Pacific National Bank, I would have insisted upon seeing the loan files in their original condition, as maintained in the branch in order that I could see exactly what the branch had in its file, when it approved the loan, and thereafter. The apparent mixing of documents from the branch loan file with documents from other parts of the bank, resulting in a reconstructed or composite file, changed the character of what had been asked for and was led to believe I was receiving. (Brotsky Decl. ER 73, ¶9)

Five attorneys, who represented various

of the plaintiffs during the discovery process, provided declarations, all of which agree on the following points: (1) That Security Pacific had purported to produce original loan files; (2) That Security Pacific had never referred to the loan files as "Special Asset Department files"; (3) That Security Pacific did not disclose that any of the loan files had been "reconstructed" or that several main office loan files were missing; and (4) That Security Pacific did not disclose that the original credit commitment reports had been destroyed. (See Brotsky, Mendelson, Avansion, Logan, and Pedder declarations. ER 73.)

On January 27, 1976, while the bank was preparing for litigation, it circulated a memorandum to employees (Pl.Ex.95-23) directing anyone with knowledge of inquiries or transactions involving the program to contact the same bank officer who had

collected the loan files. The memorandum directed the recipient to "DESTROY" the circular after reading and following its instructions. The word "destroy" is capitalized. Pl.Ex.95-23.[1/]

* * *

Jury Coercion and Lack of Unanimity: On May 13, 1981, the jury sent a written communication to the court:

> We cannot agree on a number of significant points and see no possibility that we will ever agree. Request No. 7, CR 1703, RT 21944.

1/ The bank had no reluctance at all to falsify documentation. In the Dole/Edwards transaction, the bank backdated a promissory note to make it appear that the original obligor on an $110,000 loan was the promoters rather than Dole and Edwards. As it turned out, the $110,000 loan had been to Dole and Edwards who had signed a promissory note. When Dole and Edwards defaulted, the bank destroyed their note and their loan file and substituted the promoters as if they were the original obligors. The vital credit commitment report, which would have recited the facts of the transaction and all other supporting documentation relating to the granting of the original loan destroyed. RT 16222, 16239-40. The backdating of the note and re-writing of history with respect to the 1973 Dole/Edwards loan is a violation of 18 U.S.C. §1005, a felony.

The trial court, upon being advised that the jury was deadlocked and could not reach a verdict (RT 21944), inquired about numerical division. RT 21945. When advised by the foreman that the jury was divided 4 to 2 on some issues and 5 to 1 on others, the court sua sponte gave an Allen-type charge, prefaced by remarks concerning the length and cost of the trial. RT 21946-51. Shortly thereafter, the court was advised that there was one "uncooperative" juror. RT 21959. Without consulting counsel, the court gave a second Allen-type instruction, referring to, and rebuking, without identifying, the hold-out juror. RT 21959-62. The court then excused the jury for four and one-half days to reflect on the impasse. RT 21961-2. Immediately after reconvening, the jury began to return verdicts. CR 1750.

After all thirty-three verdicts had been read the jury was polled. RT 21982.

The "hold-out" juror who had been upbraided by the court stated that his "yes" vote was "in order to get a unanimous vote." Id. Without further inquiry, or requiring further deliberations, the trial judge, in open court, insisted upon a "yes" or "no" answer. RT 21985. Despite three requests from petitioners' counsel (RT 21984, 21985, 21986), the court refused to inquire of the juror about the meaning of his statement, or whether his ultimate affirmation reflected a conscientious conviction as to the weight and effect of the evidence. Id.

The jury was discharged over the objection of petitioners' counsel. RT 21986. Motions for new trial based on coercion (ER 50) and for an evidentiary hearing on juror unanimity (ER 64) were denied (ER 75, 81).[2/]

2/ In its memorandum, the court of appeal erroneously states that the issue is raised for the first time on appeal. Appendix.

When the magistrate excused the jury for 4½ days he told them that he "trusts that I will have no more of this sort of, what I classify as, nonsense." RT 21962. After the jury had departed, he addressed counsel:

> Now, I'll state for the record. I don't feel I need advice of counsel to fuss at a jury, so I didn't discuss this with you ahead of time. I wanted to have an opportunity to tell them what I think, and to tell them unaffected by the thoughts of attorneys. RT 21962

* * *

The Award of Contractual Attorneys Fees Encompassed Respondents' Defense of Securities Act and Other Claims, and was Assessed Without A Hearing:

On July 9, 1981, Security Pacific National Bank formally noticed a motion for attorneys fees for hearing on August 7, 1981. Petitioners had previously filed post-trial motions for judgment n.o.v., and new trial, and, by letter dated July 6, 1981, requested a hearing on all post-trial motions. CR 2037.

On July 10, 1981, the magistrate informed counsel that he would "hear oral argument...on August 28, 1981, commencing at 9:30 a.m." CR 1868, emphasis added.

On August 14, 1981, the court distributed an agenda that included attorneys fees as an item for the August 28 hearing, reiterating that "motions...will be heard at 9:30 a.m. on August 28, 1981..." CR 1871.

For unexplained reasons, when Court convened on August 28, 1981, instead of the promised hearing and oral argument, the magistrate handed out orders that included approximately $2 million dollars in attorneys fees and non-statutory costs, all without a hearing. The orders are silent on California law which controlled. See Orders 9, 10, 11 (Appendix). In the course of the 8/28 proceeding, the magistrate told counsel that he had communicated ex parte with "various lawyers who authored parts of these briefs" and had thereby resolved

"whatever the confusions there were." Consequently, said the Court, "oral argument will not be either required or permitted."[3/] RT 2, 8/28/81.

* * *

The Respondent Banks' Violations of The National Bank Act Constitute An Affirmative Defense To Bank Counterclaims and the Court Should not Have Directed a Verdict for Respondent Banks: Appellants' interposed affirmative defenses to bank counterclaims alleging violation of the National Bank Act (Glass-Steagall) 12 U.S.C. §§24, 378. The banks' directed verdict motions were granted. ER 39.

3/ One result of the failure to conduct a hearing is the disparity in attorneys fees awarded arbitrarily on an undifferentiated basis with punitive effect. Petitioner Moylan was sued for $15,359, yet $47,578 was assessed against him as attorneys fees. Petitioner Lawrence was sued for $252,828 and he was assessed $47,578. Petitioner Pappas was sued for $16,527 plus interest, yet he was assessed $62,831 for fees and costs. 75% of the judgment against Pappas and others is allocated to attorneys fees and costs while petitioners such as Lawrence, with far more complex transactions, are in an opposite position with less than 20% allocated to attorneys fees and costs. There are numerous other such examples.

The material facts are uncontradicted. In each and every instance, the banks' loans were "to make available funds for investment and programs of D.M.S." Pl.Ex.95-2, (Appendix). According to an affidavit prepared by a bank officer, all D.M.S. loans were "with the understanding that the proceeds of the loans would be used by the customers to purchase and re-work mineral leases as tax shelter investments." SP Exhibit 1958.

The banks knew that the D.M.S. program it was financing was a security. RT 16792, 15047. A senior vice president warned that the bank was facilitating investments and would one day be sued. Pl.Ex.95-2 (Appendix). Earmarked loan proceeds provided 100% leverage for the investment and also provided the consideration for the unlawful sale of unregistered securities. RT 16957; Pl.Ex.95-6. Security Pacific consummated

over $9 million dollars in unsecured bank loans (Pl.Ex.95-11) to non-customers (RT 16295) over a two-year period.

The bank admits that the success of its business acquisition program depended upon the sale of securities. RT 15691. Pl.Ex.95-2. A Security Pacific memorandum acknowledges that the bank's "willingness to make available funds for investment and programs of diversified monetary systems connected [the bank] irrefutably in the mind of the borrower with Diversified Monetary Systems... protestations to the contrary notwithstanding." Pl.Ex.95-2, emphasis added.

Security Pacific considered the D.M.S. investment program a marketing vehicle (RT 16108) and "a means to an end." Pl.Ex.95-7. Bank officer Sarsfield said that the program was "an interesting way to obtain the accounts" of new customers. RT 15690. Sarsfield had advised Security Pacific's senior vice

president of the bank's participation in the program "to make sure he was aware of this potential way of developing the accounts [for] the bank." RT 15722. The bank saw it as an opportunity "to develop contacts, particularly with the medical profession by "financing...their...investments." RT 15722. As bank officer Sarsfield testified:

> What we are trying to do is get in contact with doctors without having to go out and knock on every door of every physician in the City of San Francisco. RT 15729.

Sarsfield found the sale of tax shelters to be "an interesting vehicle to increase [bank] business" (RT 15691) and the bank's highest officers looked upon it as a "business acquisition program." Pl.Ex.95-2. Its success was entirely dependent upon the unlawful sale of unregistered securities.

* * *

AUTHORITIES IN SUPPORT OF, AND AMPLIFICATION OF REASONS RELIED ON FOR, ALLOWANCE OF THE WRIT.

1. No person lacking the essential attributes of an Article III judge may exercise the judicial power of the United States: On August 5, 1983, a Ninth Circuit panel held that consensual delegation of powers to a magistrate, pursuant to 28 U.S.C. §636(c) was unconstitutional. Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 712 F.2d 1305. On August 8, 1983, petitioners, in reliance upon Pacemaker, asked the Ninth Circuit to vacate the instant judgments for lack of subject matter jurisdiction. That motion was taken under submission pending a decision by the circuit sitting en banc. On February 16, 1984, the Ninth Circuit sitting en banc reversed the Pacemaker panel. 725 F.2d 537, and on March 6, 1984, petitioners' pending motion

to vacate judgments was denied.[4/] It should be noted that six of the fourteen votes cast in the Ninth Circuit on this issue favor a holding that Section 636(c) is unconstitutional. (The unanimous Pacemaker panel and three dissents on the en banc court.)

The issue is now recurrent and will persistently arise in the district courts and courts of appeal until this Court resolves the question. This is particularly so in view of Court's decisions in Crowell v. Benson, 285 U.S. 22 (1932); United States v. Raddatz, 447 U.S. 667 (1980); and Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982), a trilogy that establishes an ineluc-

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4/ Three other circuits, the First, Second and Third, have upheld the constitutionality of 636(c). See Wharton-Thomas v. United States, 721 F.2d 922 (3rd Cir. 1983); Collins v. Foreman, 83-7938, 52 LW 2511 (2nd Cir. 2/22/84); Goldstein v. Kelleher, 83-1411, 52 LW 2511 (1st Cir. 2/29/84).

table constitutional principle.[5/]

The identical issue arises in any one of several contexts. For example, in United States v. Woodley, ___ F.2d ___, Slip Op.5730 (9th Cir. 12/8/83) the same principles, upon which the Pacemaker panel relied were applied to a recess appointment to the federal judiciary. The rationale supporting Woodley is compromised by the decision of the en banc court in Pacemaker, and Woodley conflicts with a 1962 Second Circuit decision on the same issue. United States v. Allocco, 305 F.2d 704 (2nd Cir. 1962). Allocco resolves the issue on pragmatic, rather than jurispru-

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5/ This constitutional question falls within Supreme Court Rule 17.1(c) governing review on certiorari, i.e., "when...a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court."

dential, grounds.

In Woodley, supra, the court of appeals put the question thusly:

> Whether a person lacking the essential attributes of an Article III judge -- life tenure and protection against diminution of compensation -- may nonetheless exercise the judicial power of the United States..." Slip Op.5730.

Woodley is premised on the proposition that Section 1 of Article III entitles "only judges with Article III protection [to] exercise the judicial power of the United States." Slip Op.5732. Life tenure and guaranteed compensation are "the essential attributes of an Article III judge" (Slip Op.5731), and are indispensable to judicial independence which is the hallmark of an Article III judge. Clearly, a magistrate does not fit that description. Indeed, the Woodley court, as did the Pacemaker panel and the en banc dissent, rely entirely upon decisions of this Court which have consistently "emphasized the overriding

importance of an independent judiciary." Slip Op.5736.

In Evans v. Gore, 253 U.S. 245, 253 (1920), this Court held:

> Independence of action and judgment is essential to the maintenance of the guarantees, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. 6/

The recent opinions of the First, Second, Third and Ninth Circuits, supra fn.4, upholding the constitutionality of Section 636(c), tilt heavily toward pragmatic concerns in order to sustain a practice permitting a person who lacks the attributes of an Article III judge to exer-

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6/ This pronouncement seems particularly apt in a case such as this in which a magistrate has entered judgment against private litigants in favor of the State's third largest bank (one of the Nation's ten largest) without prior review or supervision of an Article III judge, after eschewing hearings on attorneys fees, destruction of evidence and juror unanimity, and on all post-trial motions.

cise the judicial power of the United States by entering judgment in cases over which the federal courts have subject matter jurisdiction.

In Glidden Co. v. Sdanok, 370 U.S. 530 (1962) and Northern Pipeline, supra, 458 U.S. 50, this Court held unconstitutional statutory schemes designed to promote judicial efficiency. Section 636(c) is an expedient that, more often than not, is forced upon litigants and should fall of its own weight in accord with decisions of this Court.

In I.N.S. v. Chadha, 458 U.S. 1120 (1983), 103 S.Ct. 2764, 2781, this Court held that "convenience and efficiency are not the primary objectives--or the hallmarks of democratic government..." In Woodley, supra, the Ninth Circuit found that:

> The teaching of Chadha is clear. Historical acceptance and governmental efficiency are not unimportant. They will not, however, "save [a practice] if it is contrary to the Consti-

> tution. " Slip Op.5741 quoting Chadha, 103 S.Ct. at 2781.

The dissent to the Ninth Circuit en banc decision in Pacemaker concludes that the majority:

> Disrupts the proper operation of our constitutional system including the independent exercise of judicial power by individuals free of outside constraints... 725 F.2d 547.

The dissenters, as did the original Pacemaker panel, 712 F.2d 1305, concluded that the exercise of the judicial power of the United States by Article III judges cannot be allowed to depend upon stipulations of the litigants. 725 F.2d 547, 548-553.

In United States v. Raddatz, 447 U.S. 667 (1980), this Court suggests the limits of a magistrate's delegated authority holding that delegation in that case (permitting a magistrate to conduct an evidentiary hearing on a suppression motion) did not violate Article III "so long as the

ultimate decision is made by the district court." 447 U.S. at 683, emphasis added. Thus, in the instant case, the ultimate decision on issues raised in the post-trial motions which were threshold to the entry of judgment, should have been made by an Article III judge.[7/]

The original Pacemaker decision, supra, the dissent to the en banc decision, supra, and Woodley, supra, decision are all in accord with this Court's decisions in the Crowell, Raddatz, Northern Pipeline

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7/ Petitioners do not agree with the additional dissent of Judge Pregerson, 725 F.2d 556-557. There is no justification for extending Article III protections to magistrates. If we need more Article III judges then they should be appointed, but the assumption that magistrates are qualified to exercise Article III powers is unsupportable. The case below, for example, was a judicial shambles, the magnitude of which is obfuscated by a court of appeals "memorandum" that omits most of the material facts (limited to two paragraphs) and neglects to discuss in any depth the issues raised on appeal. This Court should see through that memorandum which implicitly sanctions such "a departure by a lower court from the usual course of judicial proceedings" as to call for "an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a).

trilogy. The Ninth Circuit's en banc decision in Pacemaker is not. This Court has never deviated from the constitutional principle that Congress may not delegate power that properly belongs with Article III judges (even if Article III judges are willing to permit that to happen). When the delegation includes the ultimate power to make final decisions, the Constitution mandates that such delegation be annulled.

2. The magistrate's award of attorneys fees and non-statutory costs was contrary to law and denied due process of law: The magistrate's award of $2 million dollars attorneys fees and non-statutory costs that paid for respondents' defense of securities act claims. Such an award offends controlling principles established by this Court and the Supreme Court of California. The issue falls within Supreme Court Rule 17.1(c) in that a federal court of appeals has decided an important question of law

which has not been, but should be, settled by this Court, and has decided a federal question in a way that appears to conflict with applicable decisions of this Court.

Attorneys fees may not be awarded in securities act litigation absent a finding that such litigation was undertaken in bad faith, or was meritless. Junker v. Crory, 650 F.2d 1349, 1364-5 (5th Cir. 1981).[8/] An award of contractual fees requires that a court ascertain the intent of the parties when they entered the contract. Pacific Oil & Cement Co. v. Food Machinery Chemical Corp., 178 F.2d 541, 552 (9th Cir. 1949); Calif.Civ.C. §1636. A trial court shall exercise its discretion in accord with equitable principles United States v. Mountain State Construction Co., 588 F.2d 259, 263 (9th Cir. 1978); Krause v. Rhodes, 640 F.2d 214, 218, 220 (6th Cir. 1981);

8/ No such contention has been or could be reasonably asserted in this case.

shall consider national policy Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964), and the public policy of the State of California. Ecco-Phoenix Electric Corp. v. Howard J. White, 1 Cal.3d 266, 272 (1969).[9/]

In the instant case, the trial court and the court of appeals ignore all of the above, pushing to one side threshold questions of contract interpretation, equitable considerations, public policy, pertinent provisions of the securities acts, and due process of law. In lieu of the exercise of discretion, staggering attorneys fees and non-statutory litigation costs, amounting to punitive damages, have been awarded the banks and leasing companies without a hearing.

9/ The Ninth Circuit memorandum concedes that this is the law, but does not apply it to the magistrate's refusal to conduct a hearing or to exercise discretion under California law. The magistrate's post-trial Orders 9, 10, 11 (Appendix) are silent on California law and ignore what the Ninth Circuit memorandum refers to as California's "flexible approach".

Under California law, it is the parties' intent, at the time they enter into a contract, that controls:

> It is the aim of courts, in interpreting a written contract, to give the effect to the mutual intention of the parties as it existed at the time of the execution of the contract. Pacific Oil & Cement Co. v. Food Machinery & Chemical Corp., 178 F.2d 541, 552 (9th Cir. 1949).

The standard, says the Ninth Circuit quoting Judge Learned Hand, is "what a normally constituted person would have understood [the words] to mean, when used in their actual setting." Id.

In Krause v. Rhodes, supra, the Sixth Circuit emphasizes the "broad equity powers" of a federal judge to control an award of fees authorized by contract and holds:

> That what was in the first instance a fair contract becomes unfair in its enforcement" and that "however reasonable and appropriate, the instant fee contracts were, when signed, the situation now existing differs drastically from that which the contracting parties originally contemplated. 640 F.2d at 220, emphasis added.

The magistrate ignored opinions of California's highest court interpreting contracts in accord with public policy and recognizing "the oppressive nature of a literal interpretation" of a fee provision. Ecco-Phoenix Electric Corp. v. Howard J. White, Inc., supra, 1 Cal.3d at 272.

In International Industries, Inc. v. Olen, 21 Cal.3d 218 (1978), the California Supreme Court reaffirmed that equitable principles and policy considerations that underlie judicial interpretation of attorneys fees clauses. 21 Cal.3d at 223-4. In Sciarrotta v. Teeford Construction Co., 110 Cal.App.3d 444 (1980), the California Court of Appeals, citing International Industries, Inc., supra and Ecco-Phoenix, supra, noted:

> The Supreme Court has taken a more narrow view of attorneys fee clauses precisely because of the possibility that litigation might ensue for its own sake if a simplistic and inflexible con-

> struction of attorneys fees clauses is followed. 110 Cal.App.3d at 451, emphasis added.

The instant case reveals the other side of the same coin, i.e., that a "simplistic and inflexible construction of attorneys fee clauses" has a chilling effect on bona fide litigation. See Schaulis v. C.T.B./McGraw Hill Inc., 496 F.Supp. 666, 680 (N.D.Cal. 1980). "To do so in this context could only chill individual litigants..."

The central holding of Sciarrotta is that "an attorneys fee provision in a form contract must be limited to the actions included in that clause" 110 Cal.App.3d at 450. California does not permit an interpretation of a fee clause "that could not have been reasonably contemplated or intended by the parties at the time of

contracting." 110 Cal.App.3d at 452, accord Krause v. Rhodes, supra, 640 F.2d at 218, 220. No attempt was made by the magistrate to interpret the fee clause or even consider the contemplation of the parties at the time they entered the contract.

To cast upon petitioners the burden of compensating respondents banks' and leasing companies' attorneys for conducting a defense against bona fide securities act claims is against federal policy and will unquestionably chill private litigants who have bona fide securities act claims involving economically powerful financial institutions.

(a) The award of attorneys fees and non-statutory costs, without a hearing, denied petitioners due process of law: This point is raised on appeal (see Appendix, p.1) but is ignored in the Ninth Circuit

memorandum.[10/] Appellants requested a hearing on all post-trial motions. CR 2037. Respondent Security Pacific's fee application set a hearing date of August 7, 1981. ER 54. The Court reset a hearing for August 28, 1981, on all post-trial motions and circulated an agenda that included attorneys fee motions. However, on August 28, the magistrate stated that he had communicated ex parte with "various lawyers" (not including petitioners) and had resolved "the confusions". RT 2, 8/28/81. He then entered judgment noting that "oral argument will not be either required or permitted." Id.

The controlling principle is set out by this Court in Perkins v. Standard Oil of California, 399 U.S. 222 (1969) holding

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10/ The Ninth Circuit states that it does not discuss certain points on appeal because, though "not lacking in merit", they are "not pivotal." (Memorandum, Appendix) How can an award of $2 million dollars constituting 40% of the total judgment awarded without a hearing and applying an erroneous standard; be "not pivotal"?

that attorneys fees should be "fixed in the first instance by the district court, after hearing evidence as to the extent and nature of the services rendered." 399 U.S. at 223, and, in this case we would add, interpreting the contract in accord with federal policy and California law. In Leeds v. Watson, 630 F.2d 674 (9th Cir. 1980), the Ninth Circuit applied the Perkins principle by remanding the attorneys fee issue to the district court "for the purpose of determining the appropriate counsel fee to be awarded, subsequent to an evidentiary hearing." 630 F.2d at 677, emphasis added. In Cook v. Ochsner Foundation Hospital, 559 F.2d 270, 273 (5th Cir. 1977), the court of appeals refers to the necessity for a "due process" hearing followed by "specific findings and conclusions" which set forth the basis of the trial court's ruling. Emphasis added. In Lindy Brothers Builders, etc. v. American Radiators, etc.,

487 F.2d 161 (3rd Cir. 1973), citing this Court's dictum in Perkins, supra, the Third Circuit concludes that the failure of the trial court to hold an evidentiary hearing was "inconsistent with the sound exercise of discretion." 487 F.2d at 170.

In City of Detroit v. Grinnell Corp., 495 F.2d 448 (2nd Cir. 1974), the Court of Appeals, also citing Perkins, holds that a fee award should be fixed by the district court "after hearing evidence as to the extent and nature of services rendered." 495 F.2d at 472.[11/]

In King v. McCord, 621 F.2d 205, 206 (5th Cir. 1980), the Fifth Circuit, also citing Perkins, holds that "appellants

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11/ In Grinnell, the trial court had followed a procedure strikingly similar to what occurred in the instant case. After notifying the parties that a hearing was to be held, the Court limited the hearing to oral argument, not allowed by the trial court in the instant case. 495 F.2d at 472. The court characterizes an evidentiary hearing "complete with cross-examination [as] imperative." 495 F.2d at 473.

should have been provided an evidentiary hearing to resolve the disputes and supplement its insufficient affidavits." Unimpressed with the trial court's order as "nothing more than a ceremonial obedience to Johnson," The court held that the manner in which these elements influenced the attorneys fee award must be elucidated by the trial court."

> Attorneys fee awards should not be based on the arbitrary and conclusionary predispositions of the trial judge. The failure of the district court to hold an evidentiary hearing in this case was inconsistent with the exercise of sound judicial discretion. 621 F.2d 206, emphasis added.

In Davis v. Fletcher, 598 F.2d 469 (5th Cir. 1979), the court emphasizes the necessity for assuring that fee awards are "based upon appropriate standards" and are not simply "a meaningless exercise in parroting and answering each of Johnson's twelve criteria." 598 F.2d at 470-71, emphasis added.

In the instant case, "appropriate standards" for the award of contractual attorneys fees were ignored and the Ninth Circuit's reliance upon Wagner v. Benson, 101 Cal.App.3d 27 (1980) in its memorandum opinion is misplaced. Wagner, decided by an intermediate appellate court does not cite Ecco-Phoenix, supra, or International Industries, supra, and either totally ignores the principles enunciated by the California Supreme Court in those cases or sub silentio followed those cases by determining that the action against a note-holding bank was meritless. Otherwise, Wagner v. Benson is inconsistent with Ecco-Phoenix and International Industries.[12/]

12/ The Wagner opinion suggests as much by implying that plaintiffs did not have a prima facie claim. 101 Cal.App.3d at 35. Sciarrotta, supra, decided nine months after Wagner cites both Ecco-Phoenix and International Industries and exercises discretion against a "literal and inflexible interpretation of attorneys fee clauses" where the result would be "contrary to public policy..." 110 Cal.App.3d at 451, emphasis added.

It is noteworthy that Wagner does not cite Ecco-Phoenix or International Industries.

3. The jury verdicts were coerced: Inquiry about the numerical division of a deliberating jury is plain error. United States v. Noah, 594 F.2d 1303, 1304 (9th Cir. 1979). In Brasfield v. United States, 272 U.S. 448 (1926):

> Such procedure serves no useful purpose...its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or the appellate courts and may vary widely in different situations, but in general its tendency is coercive. 272 U.S. at 450.

In Brasfield, this Court held that "the inquiry itself should be regarded as ground for reversal." Id., emphasis

added.[13/] This question falls within the purview of Supreme Court Rule 17.1(a), and (c).

Even without an inquiry about numerical division of the jury, the giving of a single Allen charge, without more, stands at the brink of "impermissible coercion." United States v. Seawall, 550 F.2d 1159, 1163, n.8 (9th Cir. 1977) and it has been the law of the Ninth Circuit (ignored here) since Seawall that having given it once, the trial judge "may not repeat the Allen charge or ask minority jurors to re-examine their standing." 550 F.2d at 1163-4, n.11. See also Iverson v. Pacific American Fisherie, 73 Wash.2d 973, 442 P.2d 243 (1968).

The Ninth Circuit said in Seawall that "problems arising from the inherently

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13/ The Ninth Circuit memorandum implies, without holding, that a different test may apply in a civil case. No court has so held and no reasoning will support such a conclusion.

coercive effect of the Allen charge have caused other courts of appeal and state courts to prohibit or to restrict severely its use", and that, given a second time, "it becomes a lecture sounding in reproof." 550 F.2d at 1162-3. In the instant case, the "reproof" explicit in the magistrate's remarks to a minority juror is striking. RT 21961-2.

In United States v. Rogers, 489 F.2d 433, 436 (4th Cir. 1961), the court found that the kind of procedure the magistrate utilized here "may readily be construed by those jurors in the minority as requiring a deferential surrender to the views, however unreasoned, of the majority." In Kesley v. United States, 47 F.2d 453, 454 (5th Cir. 1931), the court holds that "comments, not upon the evidence but reflecting on the jurors, are not permissible":

> Because of the imputation of stubbornness or worse which is likely to arise if the numerical division of the jury is publicly

> revealed, to require disclosure of it is held error per se in the courts of the United States. Brasfield v. United States, 272 U.S. 448. Much more serious is an imputation by the judge that some of the jurors are forgetting their oaths. 47 F.2d at 454, emphasis added. 14/

The Ninth Circuit memorandum incorrectly states that the coercion issue was raised for the first time on appeal. (Appendix) The issue was squarely raised in the trial court in motions for judgment n.o.v. and new trial, and as the record reflects, the magistrate provided no opportunity to object. "I don't...need advice...so I didn't discuss this with you ahead of time", and that he wanted to talk to the jury "unaffected by the thoughts of attorneys." RT 21962. Attorneys are not required to engage in futile exercises. The bell had already been rung and the issue was raised at the first meaningful opportunity prior to appeal.

14/ That very "imputation" is compelled from the magistrate's remarks here: "Whoever is responsible for that kind of conduct [is] not being observant of the oath that you took to discharge your responsibility." RT 21961-2.

4. The verdict was not unanimous: Unless otherwise stipulated, a verdict in a civil case must be unanimous. Fox v. United States, 417 F.2d 84, 89 (2nd Cir. 1969); Rule 48 Fed.R.Civ.P. An "affidavit of a juror is admissible to show the true verdict or that no verdict was reached at all." Fox v. United States, supra, 417 F.2d at 89. The Ninth Circuit memorandum is contra (see Appendix) and is wrong.

It is appropriate for the trial court on motion for new trial to set aside the verdict where it appears that a juror, who seemingly agreed to the verdict before it was signed, in fact dissented therefrom. Id., see also Matisse v. Maryland Casualty Co., 5 F.2d 233, 234 (D.C.Wash. 1925).

In Fox, a juror was silent when polled. In the instant case, the juror expressly stated during the jury poll that "in order to get a unanimous vote" he had voted "yes". RT 21982. The Second Circuit held that

the trial judge had a duty to "eliminate all doubt as to whether the verdict of the jury is unanimous." 417 F.2d at 89. This is precisely what petitioners' counsel asked the magistrate to do on three occasions and he refused. RT 21984, 21985, 21986.

Where there is uncertainty or contingency as to the finality of a jury verdict, the legal effect is the same as if there had been no verdict. Sincox v. United States, 571 F.2d 876, 878 (1st Cir. 1978). The California Supreme Court has stated:

> Acquiescence simply because the verdict has been reached by the majority is not an independent judgment, and if permitted, would undermine the right to a unanimous verdict. People v. Superior Court, 67 Cal.2d 929, 932 (1967).

It is error to require a juror, after an ambiguous response, to make up his mind in open court. United States v. Sexton, 456 F.2d 961, 967 (5th Cir. 1972); see also Bruce v. Chestnut Farms-Chevy Chase Dairy,

126 F.2d 224, 225 (D.C. Cir. 1942) "The jury should be required to retire and give further consideration."

In United States v. Morris, 612 F.2d 483 (10th Cir. 1979), the court held:

> [I]n any case upon the appearance of any uncertainty or contingency in a jury's verdict, it is the duty of the trial judge to resolve that doubt, for "there is no verdict as long as there is any uncertainty or contingency to the finality of the jury's determination." 612 F.2d at 489, emphasis added.

The magistrate had the opportunity to resolve the ambiguity at a later point by conducting a hearing on that subject. Petitioners' motion for an evidentiary hearing (ER 64) was denied (ER 75). Post-trial evidentiary hearings requiring the attendance of jurors are allowed. Morgan v. United States, 399 F.2d 93, 97 (5th Cir. 1968) cert.denied 393 U.S. 1025 (1969); Remmer v. United States, 347 U.S. 227, 230-231 (1954).

5. Security Pacific National Bank's destruction of files and records: Security Pacific destroyed, altered and otherwise mishandled material evidence.[15/] The Ninth Circuit memorandum ignores this issue although expressly raised. (See Appendix, p.1, Issue No. 3).[16/] The point was also raised in the trial court in motions for judgment n.o.v. and new trial but a scheduled hearing on post-trial motions was annulled. F.R.Civ.P. 59, 60(b)(3).

A court may relieve a party from a final judgment, order, or proceeding for the fraud, misrepresentation, or other misconduct of an adverse party.

15/ This is within the purview of Sup.Ct. Rule 17.1(a) in that a federal court of appeals has so far departed from the accepted usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

16/ The point is presumably encompassed in the memorandum's closing paragraph. This issue, not lacking in merit, is pivotal, as the cited cases indicate.

Rule 60(b)(3) Fed.R.Civ.P., Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978); Atchison, Topeka & Santa Fe v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957); Toledo Scales Co. v. Computing Scales Co., 261 U.S. 399, 421 (1923).

The application of Rule 60(b)(3) does not require that the information withheld, or destroyed, be of such nature as to alter the result in the case and "a litigant who has engaged in misconduct is not entitled to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." Rozier v. Ford Motor Co., supra, 573 F.2d at 1346, citing Minneapolis St. Paul and S.S. Marie Rwy. Co. v. Moquin, 283 U.S. 530, 521-522 (1931). A party may prevail without showing that the alleged fraud affected the outcome of the trial. Wilson v. Thompson, 638 F.2d 801, 804 (5th Cir. 1981)

A defendant who destroys documents in

anticipation of litigation thereby rendering useless plaintiffs' attempt to obtain meaningful discovery is subject to sanctions. Alliance To End Repression v. The Rochford, 75 F.R.D. 438 (N.D.Ill. 1976)

> It has long been recognized that sanctions may be proper where a party, before a lawsuit is instituted, willfully places himself in such a position that he is unable to comply with a subsequent discovery order. Bowmar Instrument Corp. v. Texas Instruments, Inc., 25 Fed.R.S. 2d, 423, 427 (N.D.Ind. 1977). See also National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976).

Rule 26(e)(2) Fed.R.Civ.P. requires that when interrogatory responses are incorrect, there is a duty "seasonably to amend." None of the interrogatory responses were amended. See "Statement of Case," supra.

It was an abuse of discretion for the district court not to conduct a hearing on this issue and, having failed to do so, the court of appeals should have examined

the uncontradicted evidence and provided relief pursuant to Rule 60(b)(3). Fed.R.Civ.P.

6. Assertion of violation of the Glass-Steagall Act as an affirmative defense to bank counterclaims: First, the trial court should not have directed a verdict on the issue. ER 39. There was substantial uncontradicted evidence of a violation, accompanied by the bank's own admissions. See Pl.Ex.95-2. Appendix. Second, private litigants are entitled to assert a violation of Glass-Steagall as an affirmative defense. The latter is an "important question of federal law, which has not been, but should be, settled by this Court." Sup.Ct. Rule 17.1(c). A directed verdict should be granted only when the court can say "as a matter of law the evidence was capable of only one interpretation." Juhnke v. E.I.G. Corp.,

444 F.2d 1323, 1325 (9th Cir. 1971). The opposite was true here.

The purpose of the National Bank Act is to confine national banks to the exercise of only "such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. §24(7). Investment Company Institute v. Camp, 401 U.S. 617 (1971) In Camp, this Court citing the congressional record notes:

> Senator Glass made it plain that it was 'the fixed purpose of Congress' not to see the facilities of commercial banking diverted into speculative operations by the aggressive and promotional character of the investment banking business. 401 U.S. at 632.
>
> * * *
>
> Our great banking system was diverted from its original purposes into investment activities...the purpose of the regulatory provisions of this bill is to call back to the service of agriculture and commerce and industry the bank credit and the bank service designed by the

framers of the Federal Reserve Act. 401 U.S. at 633, n.29. 17/

Although "lending" is directly related to a national bank's express powers, it violates the act when it is integral to a relationship with a securities promoter and designed to increase bank profits by facilitating the

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17/ Security Pacific's internal memorandum (Pl.Ex.95-2) admits that the bank was engaged in acts prohibited by Glass-Steagall. The Security Pacific officer who prepared that document viewed the dangers of the bank's participation in the program in the same way as Congress and the Supreme Court perceived them, 401 U.S. at 633, but the bank for profit went ahead anyway and advanced another $9 million. The memorandum sets out three hazards that this Court considered the very evils prohibited by Glass-Steagall: (1) identification of the bank with the promoter in the mind of the borrower; (2) loans intended to "facilitate" a particular investment; and (3) loss of confidence, with the result that "disenchanted" customers would become litigants. The memorandum tracks this Court's recitation of congressional purpose as expressed in Camp: "There was also perceived the danger that when commercial banks were subject to the promotional demands of investment banking, they might be tempted to make loans to customers with the expectation that the loan would facilitate the purchase of stocks and securities." 401 U.S. at 631-632, emphasis added.

sale of securities to the general public, "notwithstanding that it may be convenient and useful in attracting customers who may also become depositors and borrowers." American Society of Travel Agents v. Bank of America, 385 F.Supp. 1084, 1087 (N.D.Cal. 1974), emphasis added.

In Board of Governors of the Federal Reserve System v. Investment Co. Institute, 450 U.S. 46 (1981), this Court reviewed the congressional purpose for Glass-Steagall and noted that the kind of bank services the Court was considering in that case were not significantly different from the traditional fiduciary functions of commercial banks, i.e., to manage the investment portfolio of customers in the form of trusts, estates, and agency accounts. 450 U.S. at 55. However, the extension of unsecured bank loans to promoter recruited customers for speculative investment purposes is not one

of the "traditional fiduciary functions of commercial banks".

This Court has not ruled upon the efficacy of either a private claim under Glass-Steagall or an affirmative defense to a Glass-Steagall violation. The sparse legal authority to date is to the effect that the Act does not give rise to a private damage claim. See Stein v. Galitz, 478 F.Supp. 517 (N.D.Ill. 1978); Russell v. Continental Illinois National Bank & Trust Co., 479 F.2d 131 (7th Cir. 1973). Here, however, the violation is asserted as an affirmative defense to enforcement of bank promissory notes. The notes facilitated the unlawful sale of unregistered securities and were integral to the banks' promotion of new business. See Pl.Ex.95-2, Appendix.

It is a general rule that a court will not allow recovery on an illegal contract. Hedla v. McCool, 476 F.2d 1223, 1227 (9th Cir. 1973). Where violative conduct undermines the purpose of legisla-

tion and congressional intent, the contract will not be enforced.

> [F]ederal public policy requires such annulment in order to secure observance, effectuate the legislative purpose, and prevent noxious consequences. General Life of Missouri Investment Co. v. Shamburger, 546 F.2d 746, 784 (8th Cir. 1976).

In Kaiser Frazier Corp. v. Otis & Co., 195 F.2d 838 (2nd Cir. 1962) cert.denied 344 U.S. 856 (1962), the court of appeals voided a contract which would not itself have been illegal because it was closely related to acts that were.

> [A] contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable...this is so, regardless of the equities as between the parties, for 'the very meaning of public policy is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone'...[W]e are satisfied that the contract was so closely related to the performance of acts forbidden by law as to be itself illegal." 195 F.2d at 844, emphasis added.

The promissory notes here were central to the banks' violation of Glass-Steagall.

Enforcement of these notes defeats congressional purpose and permits the banks to profit from their wrongdoing. A contractual obligation arising in the course of securities violations is "voidable when the purposes of the [securities] acts are thereby furthered." Byrnes v. Faulkner, Dawkins & Sullivan, 550 F.2d 1303, 1313 (2nd Cir. 1977). Conversely, if non-enforcement of a contract would frustrate legislative purpose, the contract will be enforced. A.C. Frost & Co. v. Cour D'Alene Mines Corp., 312 U.S. 38, 43 (1941):

> The ultimate issue is whether the result in the particular case would effectuate or frustrate the purpose of the act. Emphasis added.

See also Serzysco v. Chase Manhattan Bank, 290 F.Supp. 74, 90 (S.D.N.Y. 1968) aff'd 409 F.2d 1360 (2nd Cir. 1969) wherein the court barred the bank's enforcement of promissory notes because of violation of

Regulation U, margin requirements.[18/]

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

DATED: April 11, 1984.

Respectfully submitted,

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18/ Had these investment contracts been listed securities, all of the bank loans would have violated Regulation U. A suit to collect on the promissory notes would have been barred by illegality. "Under the provisions of 15 U.S.C.A. §77(c)(b)...contracts which are in violation of Regulation U are declared void." Serzysco v. Chase Manhattan Bank, 290 F.Supp. 74, 90 (S.D.N.Y. 1968), aff'd 409 F.2d 1360 (2d Cir. 1969). Regulation U was promulgated pursuant to the Securities Exchange Act of 1934, in part, to protect investors from excessive trading and relates to listed (and, therefore, registered) securities. It is illogical to hold that Congress intended to penalize commercial banks that illegally finance the purchase of listed securities, but gave carte blanche to banks that facilitate the sale of unlisted (and, here unregistered) securities. The former is within the purview of the securities acts, the latter within the purview of the National Bank Act.

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83 - 1684
No. -

In the Supreme Court

OF THE

United States

SERGIUS BRYNER and FRANCIS BRYNER, et al.
Petitioners,

VS.

SECURITY PACIFIC NATIONAL BANK, COMMERCIAL BANK OF SAN FRANCISCO, CAPITAL RESERVE LEASING CORPORATION, C.I.T. CORPORATION, and LEASCO CAPITAL EQUIPMENT CORPORATION,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EXCERPT FROM PETITIONER'S OPENING BRIEF ON APPEAL TO NINTH CIRCUIT

STATEMENT OF ISSUES PRESENTED FOR APPEAL

1. Whether the evidence establishes as a matter of law that the appellee banks violated Section 12(1) of the Securities Act of 1933 and whether there is substantial evidence to support verdicts in favor of appellee banks on the 12(1) issues.

2. Whether the evidence establishes as a matter of law that appellee banks violated the National Bank Act (Glass-Steagall) [12 U.S.C. §§ 24, 378].

3. Whether appellee Security Pacific National Bank suppressed, destroyed and altered the character of critical evidence in order to enforce its promissory note counterclaims and escape liability for

securities law violations and for fraud.

4. Whether there is substantial evidence to support the verdicts favoring the appellee leasing companies (C.I.T., Leasco and Capital Reserve) on their counterclaims for balances on equipment leases.

5. Whether it was reversible error to place the burden of proving non-performance of the leasing company contracts on the lessees.

6. Whether the Rule 10b-5 jury instructions constitute reversible error.

7. Whether the verdicts were coerced by supplemental jury instructions which are contrary to the law of this circuit.

8. Whether the jury verdicts favoring the banks and leasing companies were unanimous.

9. Whether it was error to refuse a post-trial evidentiary hearing on the issue of juror unanimity.

10. Whether it was prejudicial error

to provide the jury a copy of the 20,000-page trial transcript, including all stricken material, for its unsupervised use in the course of deliberations.

11. Whether appellants were afforded due process of law in the assessment of $2 million attorneys' fees and nonstatutory costs without a hearing.

12. Whether attorneys' fees and non-statutory costs were awarded in accord with relevant principles of contract law, whether interest was properly computed, and whether a double recovery has been sanctioned.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH L. POTSTADA, et al., Plaintiffs/ Appellants, vs. RICHARD D. FREEMAN, et al., Defendants/ Appellees.	CA Nos. 81-4515 81-4516 81-4517 81-4518 81-4552 81-4600
RANDOL PURVIANCE, et al., Cross-Claimants/ Appellees, vs. SECURITY PACIFIC NATIONAL BANK, a National Banking Association, Cross-Defendant/ Appellant.	MEMORANDUM*

Appeal from the United States District Court for the Northern District of California Samuel Conti, District Judge, Presiding
Argued and submitted August 8, 1983

Before: WALLACE, SNEED, and FARRIS, Circuit Judges

Joseph L. Potstada and Loretta Potstada,

husband and wife, et al., investors in a fraudulent tax shelter scheme brought action against the promoters of the fraud, the banks that financed the investments and the leasing companies that financed the purchase of certain drilling equipment. In response to the investors' claims, the banks and leasing companies counterclaimed to collect unpaid balances on promissory notes and equipment leases. The district court directed a verdict against the promoters. The jury found for the leasing companies and ruled in favor of the banks on all issues except one: it found that the banks had breached a fiduciary duty to several plaintiffs. The district court denied all motions for judgment notwithstanding the verdict and new trial, and awarded costs and attorneys' fees to the banks and the leasing companies. The several appeals of the parties are consolidated in this action.

FACTS

There is no question that a scheme was utilized to enable an investor to obtain tax credit with almost no out-of-pocket investment. The tax shelter investments which the promoters marketed were "working interests" in Texas oil or gas leases. The investor generally obtained unsecured loans from a bank to provide the funds needed for improvements to the lease, and then deducted the amount invested as an intangible drilling expense. Potential investors, who sought financing (and almost all investors did) were referred by the promoters to the defendant banks.

The leasing companies were financing alternatives to the banks and were used to finance the acquisition of the equipment needed to rework the oil and gas leases. Based on the plaintiffs' credit applications, the leasing companies executed an

equipment lease. In accordance with the lease, the leasing companies paid the equipment supplier after receiving the plaintiffs' signed acknowledgments that the equipment had been delivered.

LEGAL ANALYSIS

I. Should the Jury Finding that the Banks Did Not Violate Section 12(1) of the Securities Act of 1933, 15 U.S.C. §77 l(1) be Overturned on the Grounds that there was Insufficient Supporting Evidence or on the Grounds that the Bank Should be Held to Have Violated Section 12(1) as a Matter of Law?

Plaintiffs appeal the jury verdict that the bank did not violate Section 12(1) of the Securities Act of 1933, 15 U.S.C. §77 l(1), which prohibits offering or selling a security in violation of Section 77e. They contend that there was insufficient evidence to support the jury's verdict in favor of the bank, that the jury verdict should be overturned and that the banks should be found to have sold unregistered securities as a matter of

law.

The determination of a motion for judgment notwithstanding the verdict or for a new trial on the ground that the jury verdict is not supported by substantial evidence is left to the sound discretion of the trial court. Raynor Bros. v. American Cyanamid Co., 695 F.2d 382, 385 (9th Cir. 1982). The standard for appellate review is whether, viewing all of the evidence in the light most favorable to the prevailing party, there is substantial evidence to support the jury's verdict. Id.; Angle v. Sky Chef,, Inc., 535 F.2d 492, 494 (9th Cir. 1976); Beverage Distributors, Inc. v. Olympia Brewing Co., 440 F.2d 21, 24-25 (9th Cir. 1971), cert. denied, 403 U.S. 906 (1971). We have reviewed the record. While a contrary verdict would also be supported by the record, the jury's verdict is reasonable in light of the evidence.

The jury was instructed on both the "risk capital" and the "participant liability" theories of liability under Section 12(1), and found against the plaintiffs. There is no objection to these instructions. Under the risk capital doctrine, a loan transaction may be characterized as a sale of securities when the loaning party has a substantial risk of loss and is effectively financing the "entrepreneurial or managerial efforts" of others. Amfac Mortgage Corp. v. Arizona Mall of Tempe, 583 F.2d 426, 433 (9th Cir. 1978); Great Western Bank & Trust v. Kotz, 532 F.2d 1252, 1257 (9th Cir. 1976). Even assuming that the risk capital analysis applies to the facts here, the record demonstrates ample evidence from which a reasonable jury could find that the bank's promissory notes did not constitute securities under the "risk capital" test established in Great Western Bank, supra,

532 F.2d at 1257-58.

Under the theory of participant liability set forth in Securities and Exchange Commission v. Murphy, 626 F.2d 633, 650 (9th Cir. 1980), a defendant who did not actually sell securities will be considered a "seller" if the defendant's acts were both necessary to and a substantial factor in the sales transaction. The theory of participant liability has generally been applied to people who were closely connected with the solicitation of securities--persons who design the sale scheme, or actively promote the sale. Thus in both Murphy, supra and in Hill York Corp. v. American Internat'l Franchises, Inc., 448 F.2d 680 (5th Cir. 1971), persons who had devised the scheme to sell securities unlawfully, and were the motivating force behind the sales transactions were held to be "sellers" within the meaning of Section 12(1). Brokers and attorneys have been held liable

as "sellers" under Section 12(1) because of their solicitation activities. See Lewis v. Walston & Co., Inc., 487 F.2d 617 (5th Cir. 1973); Wasson v. Securities and Exchange Commission, 558 F.2d 879 (8th Cir. 1977); Junker v. Crory, 650 F.2d 1349 (5th Cir. 1981). No court has ever found a bank to be a "seller" within the meaning of Section 12(1). See Wright v. Schock, CCH Fed. Sec. L. Rep. ¶99,411 (N.D. Cal. 1983); Jefferies & Co. v. United Missouri Bank, CCH Fed. Sec. L. Rep. ¶99,257 (W.D. Mo. 1983).

We recognize that a bank can upon proper facts be liable as a "seller," but here the record permits a reasonable jury to find that the banks were not a necessary or substantial factor in the tax shelter scheme. While bank services were necessary to the sales transactions, these particular banks were not "necessary" since any other banks could have provided

the loan services that would have facilitated the sale transactions. See Nicewarner v. Bleavins, 244 F.Supp. 2671, (D. Colo. 1965). See also Wright, supra.

Further, the banks introduced sufficient evidence for a reasonable jury to find that the banks were not a substantial factor in bringing about the sale. The record reflects testimony that the banks did not solicit investors; promote the investment scheme; have any direct financial interest in the DMS venture or any control over DMS's policies; that the banks acted as ordinary commercial lenders and loaned on the basis of borrowers' personal credit; and that the investors were already persuaded to invest in the scheme before they sought the loans.

We reject the argument that the banks should be held liable under Section 12(1) as a matter of law. There were material factual disputes about whether the banks

were a necessary and substantial factor in the sales transaction. The record justifies submission of the issues to a jury. The jury finding that the banks did not violate Section 12(1) is based on evidence in the record. We affirm the denial of the motion for judgment notwithstanding the verdict and for a new trial.

II. Did the District Court Err By Directing a Verdict Against the Plaintiffs' Affirmative Defenses Under the National Bank Act, 12 U.S.C. §§24,378?

Plaintiffs seek reversal of the directed verdict favoring the bank on the plaintiffs' claims under the National Bank aCt. A directed verdict is proper and will be upheld if "the evidence permits only one reasonable conclusion as to the verdict." Shakey's, Inc. v. Covalt, 704 F.2d 426, 430 (9th Cir. 1983); Cal. Computer Products v. Internat'l Business Machines Corp., 613 F.2d 727, 733-34 (9th Cir. 1979).

Plaintiffs' affirmative defenses to the banks' claims for unpaid balances are based on Section 16 of the Glass-Steagall Act, which prohibits national banks from trading in securities for their own account or underwriting any issue of securities, and on Section 21 of the Act, which forbids any company "engaged in the business of issuing, underwriting, selling or distributing" securities to engage at the same time in the business of banking. See 12 U.S.C. §§24,378(a)(1). Plaintiffs argue that the banks' promissory notes should not be enforced because they facilitated the unlawful sale of unregistered securities, and thus constitute illegal contracts.

Even if the loan transactions violated the National Bank Act, plaintiffs do not have standing to assert the National Bank Act as an affirmative defense to the banks' collection of amounts due on the promissory

notes. Individuals do not have a private right of action against banks based on the Act. Russell v. Continental Ill. Nat. Bank & T. Co. of Chicago, 479 F.2d 131, 134 (7th Cir.), cert. denied, 414 U.S. 1040 (1973); Golar v. Daniels & Bell, Inc., 533 F.Supp. 1021, 1026 (S.D.N.Y. 1982); Stein v. Galitz, 478 F.Supp. 517, 520-21 (N.D.Ill. 1978). Enforcement of the Act is left to the United States because investors are not members of "the class for whose especial benefit the statute was enacted." Russell, supra, 479 F.2d at 134.

Courts have refused to allow borrowers to assert violations of the Act as a defense to banks' enforcement of contractual claims for the same policy reasons that courts have prohibited a private right of action against banks. Thompson v. St. Nicholas Nat'l Bank, 146 U.S. 240, 250-51 (1892); Union Nat. Bank of St. Louis v. Matthews,

98 U.S. 621, 629 (1879); Federal Deposit Ins. Corp. v. Freudenfeld, 492 F.Supp. 763 (E.D.Wis. 19809). Both Matthews and Thompson strongly disapproved of private investors' affirmative defenses under the Act. Freudenfeld, supra, followed the rationale in Thompson and explicitly held that a party could not defend against a bank's contractual claim on the grounds that the bank's contract violates the National Bank Act. "Since only the federal government can challenge the actions of American, defendant Freudenfeld will not be permitted to challenge the banks' actions." Freudenfeld, supra, 492 F.Supp. at 768. We affirm the directed verdict.

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IV.(Sic) Should the Jury Verdict in Favor of the Leasing Companies Be Overturned on the Grounds that There is Insufficient Evidence to Support the Verdict?

The plaintiffs assert that a judgment notwithstanding the verdict should be entered against the leasing companies because the verdict in favor of the leasing companies on their counterclaims for unpaid balances is without the support of substantial evidence. Plaintiffs contest both the finding that the leasing companies were not agents of DMS and the finding that there was no failure of consideration. Our review of jury findings is limited to determining whether there is any substantial evidence that will support those findings. More v. Telfon Communications Corp., 589 F.2d 959, 964 (9th Cir. 1978).

1. Agency

Plaintiffs contend that DMS routinely obtained the investors' signatures upon delivery receipts, knowing that the customer was absent and that equipment had not been delivered to the site. These actions, according to the plaintiffs, make DMS an agent of the leasing companies, and as an agent, DMS's knowledge that there was no delivery is imputed to the leasing companies. The determination of whether there is an agency relationship is generally a question for the trier of fact. Dogherra Safeway Stores, Inc., 679 F.2d 1293, 1295 (9th Cir.), cert.denied, 103 S.Ct. 346 (1982). The jury was thoroughly instructed on the plaintiffs agency theory, and returned a special verdict finding that DMS was not an agent of the leasing companies. There were no objections to these jury instructions. The agency issue was fully litigated. There is substantial evidence to support

the jury findings.

2. Failure of Consideration

Plaintiffs contend that the leased equipment was never delivered, and that this constitutes a failure of consideration which releases them from liability for the unpaid balances. The jury was properly instructed in accordance with California law that in order to recover on the contract, the leasing companies had to allege and prove performance. See Cal.Civ.Code §1439; Wal-Noon Corp. v. Hill, 45 Cal.App.3d 605, 612, 119 Cal.Rptr. 646, 650 (1975); Sosin v. Richardson, 210 Cal.App.2d 258, 26 Cal.Rptr. 610, 613 (1962). Delivery of the leased equipment was a condition of performance because a California statute provides that: "One who leases personal property must deliver it to the lessee." Cal.Civ.Code §1955. The district court informed the jury that this provision was to be construed as part

of each equipment lease contract.

The delivery and acceptance receipts that were signed by the plaintiffs acknowledging that the equipment had been delivered constitute sufficient evidence of delivery to support the jury's verdict in favor of the leasing companies. Investors had the opportunity to verify the delivery of the equipment. Even if they failed to verify delivery prior to signing the receipt, they affirmatively represented to the leasing companies that the equipment had been received. In so doing they knew that the leasing companies would then pay for the equipment. There is no basis to disturb the jury finding on appeal.

IV Does Placing the Burden of Proving Nonperformance of the Leasing Contracts on the Plaintiffs Constitute Reversible Error?

Plaintiffs contend that the burden of proving delivery of the equipment was

improperly transferred from the leasing companies to the plaintiffs. Their claim is based upon the jury instruction which states that the leasing companies are entitled to the balances due unless the plaintiffs establish failure of consideration by a preponderance of the evidence. The leasing companies claim that this instruction is in accordance with Cal.Civ.Code §1614. Section 1614 provides that a party seeking to invalidate a written agreement has the burden of proving lack of consideration. The jury instruction improperly shifted the burden of proof, but the error was harmless.

The leasing companies confuse the defense of lack of consideration with a defense of failure of consideration. Whereas "lack" or "want" of consideration means that a party made a promise without receiving any corresponding benefit, "failure" of consideration means that a party has

materially failed to perform its contractual obligation. See 1 Corbin on Contracts §133 (1963).

The burden of proving failure of consideration was improperly allocated to the plaintiffs. The party seeking to enforce the contracts has the burden of pleading and proving that he or she has performed all of the conditions and agreements of the contract. Hetherington v. Hartford Fire Insurance Co., 93 Cal.App.3d 383, 156 Cal.Rptr. 116, 118 (1979); Acoustics, Inc. v. Trepte Construction Co., 14 Cal.App.3d 887, 913, 92 Cal.Rptr. 723, 740-41 (1971); Sosin v. Richardson, 210 Cal.App.2d 258, 26 Cal.Rptr. 610 (1963).

We review jury instructions in their entirety to determine if "the jury was misled in any way and whether it had [an] understanding of the issues and its duty to determine those issues." Van Cleef v. Aeroflex Corp., 657 F.2d 1094, 1099 (9th

Cir. 1981); Marquis v. Chrysler Corp., 577 F.2d 624, 636 (9th Cir. 1978). e are convinced after reviewing all of the instructions and the evidence presented at trial that the erroneous instructions are harmless beyond a doubt. Another jury instruction correctly states that the leasing companies have the burden of proving delivery. Furthermore, the evidence of delivery consisted of plaintiffs' own acknowledgments of delivery.

V. Do the District Court's Instructions on the 10b-5 Issue Constitute Reversible Error?

Plaintiffs claim that one of the 10b-5 instructions was erroneous because it burdened them with proving that they would have acted differently had they been aware of omitted facts. This instruction did not improperly shift the burden of proof. While a plaintiff's reliance on omitted facts is presumed from proof of the omission of material facts--see

Affiliate Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972)--this presumption can be rebutted. See Bell v. Cameron Meadows Land Co., 669 F.2d 1278, 1284 n.11 (9th Cir. 1982). The instruction does not explicitly shift the burden of proof to plaintiffs. It merely instructs the jury not to find liability under Rule 10b-5 if they find that plaintiffs did not rely on omissions. This case is thus distinguishable from Kramas v. Security Gas & Oil, Inc., 672 F.2d 766, 769 n.1 (9th Cir.), cert. denied, 103 S.Ct. 444 (1982).

VI. Was there Error in the Jury Verdicts that Requires Reversal?

Plaintiffs claim that a new trial should be granted on the grounds that the jury was coerced and the verdict was not unanimous. Plaintiffs' coercion claims are based on the trial judge's questioning and his instructions to the jury. After eight days of deliberations, the jury

informed the court that they could not agree on a number of significant issues. Although the judge did not directly ask for the numerical division, his question elicited the numerical division of the jury. The trial judge then remarked on the length of the trial and the jury fee expenses, and read a "modified Allen charge." The trial judge later instructed the jury, among other things, to "listen carefully to the opinion of others...and try to come up with a verdict which of course must be unanimous." There was no coercion or lack of unanimity.

The issue of jury coercion is raised for the first time on appeal. The plaintiffs made no objection to the judge's inquiry or to either of the "Allen-type" instructions at trial. The judge's inquiry is not grounds for reversal. Brasfield v. United States, 272 U.S. 448 (1926) and United States v. Noah, 594 F.2d

1303 (9th Cir. 1979) are inapplicable here. Plaintiffs did not object to the trial court's inquiry. See Chicago, Rock Island and Pacific Railroad Co. v. Hugh Breeding, Inc., 247 F.2d 217, 227 (10th Cir. 1957); Maloney v. Tunnell, 218 F.2d 705, 709-11 (3d Cir. 1955). Further, this case is distinguishable from Brasfield and Noah. This is a civil action.

The plaintiffs' objections to the unanimity of the verdict are based on one juror's statements after the jury had returned its verdicts against the plaintiffs. Upon being polled about his vote, one juror, juror McKeag, stated that: "In order to get a unanimous vote I voted yes." After further questioning he admitted that his verdict was a yes. McKeag's affidavit explaining his vote is not admissible to impeach the jury's verdict. Fed.R.Evid. §606(b). He affirmed his verdict in open court, and thus the holding

in United States v. Nelson, 692 F.2d 83 (9th Cir. 1982), is not applicable.

VII. Did the District Court Err by Not Limiting its Award to Those Attorney's Fees and Costs Related to Recovery of the Unpaid Balances Owed the Banks?

While the district court's fact findings in determining an award for attorneys' fees are reviewed under an abuse of discretion standard, the legal principles relied upon by the court are subject to de novo review. Lewis v. Anderson, 692 F.2d 1267, 1269 (9th Cir. 1982). Plaintiffs ask us to reverse the attorneys' fees award on the grounds that the principle of Wagner v. Benson, 101 Cal.App.3d 27, 161 Cal.Rptr. 516 (1980) should not be applied here.

California law governs the fee awards. See Kabatoff v. Safeco Ins. Co. of America, 627 F.2d 207, 210 (9th Cir. 1980). The California Supreme Court advocates a flexible approach to the interpretation of an attorneys' fees clause. Public policy,

equity and the potential affect on litigation are all to be considered in determining an award for attorneys' fees. Sciarrotta v. Teaford Construction Co., 110 Cal.App.3d 444, 167 Cal.Rptr. 849, 852 (1969).

While these factors may justify a departure from the rule set forth in Wagner, supra, the facts support the district court's decision to follow Wagner. In Wagner the court examined an attorneys' fee contract which provided that the prevailing party was to be compensated for costs incurred in enforcing the contract. The Court held that the attorneys' fees awarded should not be apportioned between the defense and collection aspects of the case when a party's litigation in defense of a contract was necessary to its collection efforts on the contract. Wagner was followed in IMO Development Corp. v. Dow Corning Corp., 135 Cal.App.3d 451, 464-65,

185 Cal.Rptr. 341, 349 (1982). (Issues cannot be separated for the purpose of apportioning the attorneys' award because determination of action for rescission of contract was "necessarily dispositive" of determination of contract obligation.) See also Michael-Regan Co., Inc., v. Lindell, 527 F.2d 653, 659 (9th Cir. 1975); Jaeger v. Canadian Bank of Commerce (California), 327 F.2d 743, 745-46 (9th Cir. 1964).

The plaintiffs' securities claims against the banks were "necessarily dispositive" of the banks' enforcement of the promissory notes. Plaintiffs sought to declare the promissory notes invalid on the basis of the securities laws, and thus the banks had to successfully defend against this in order to prevail on their collection claim. We affirm the award of attorneys' fees.

VIII. Did the District Court Err in Determining that the Promoters Were Collaterally Estopped From Denying that they had Engaged in an Overall Scheme to Defraud?

The defendant/promoters were convicted for mail fraud and interstate transportation of fraudulently taken property prior to the plaintiffs' instigation of this civil action. See United States v. Freeman, 619 F.2d 1112 (5th Cir.), cert.denied, 450 U.S. 910 (1980), where the defendants' criminal conviction is affirmed. Defendants C. and Alaine Temp appeal the district court's decision estopping the Temps from denying that they engaged in an overall scheme to defraud. Specifically, the Temps assert that the district court should not have allowed the use of collateral estoppel without reviewing the entire record of the criminal conviction, and that the district court permitted the application of collateral estoppel to facts that were not necessarily

determined in the criminal trial.

While it may be preferable and at times necessary for a court to examine the entire record, it was not error for the trial court to look solely to the appellate court opinion and the jury instructions to determine what was decided in the criminal proceeding for collateral estoppel purposes. See Emich Motors v. General Motors, Corp., 340 U.S. 558, 560-62 (1950); United States v. Podell, 572 F.2d 31, 35-36 (2d Cir. 1978); SEC v. Everest Management Corp., 466 F.Supp. 167, 172-74 (S.D.N.Y. 1979).

The Temps claim that collateral estoppel should not be applied to a finding that they engaged in an overall scheme to defraud because the facts necessarily determined in the criminal trial only involved a scheme using unowned leases to defraud a few plaintiffs. A scheme to defraud was one of the essential elements

of a crime for which the Temps were convicted. See Freeman, supra, 619 F.2d at 1117. The jury verdict was thus "firmly rooted" in a finding that the Temps were engaged in a fraudulent scheme. There is no error in estopping the Temps from denying that they engaged in an overall fraudulent scheme when the jury had found that they engaged a fraudulent scheme that affected a few of the plaintiffs. The application of collateral estoppel did not prevent the Temps from litigating whether the individual plaintiffs in this case were victims of the fraud and the damages, if any, owed. The cases cited by the plaintiff are not applicable here. See Columbia Plaza Corp v. Security Nat. Bank, 676 F.2d 780, 789-90 (D.C.Cir. 1982) (No collateral estoppel where indictment for conspiracy listed 85 overt acts and it was impossible to determine which acts were necessary for the conviction.) We uphold

the district court's application of collateral estoppel.

Other issues raised on appeal, though not lacking in merit are not pivotal.

Affirmed.

DATED AND FILE STAMPED: October 31, 1983.

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

Filed
Nov. 15, 1983

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH L. POTSTADA, et al., Plaintiffs/ Appellants, vs. RICHARD D. FREEMAN, et al., Defendants/ Appellees.	CA Nos. 81-4515 81-4516 81-4517 81-4518 81-4519 81-4552
RANDOL PURVIANCE, et al., Cross-Claimants/ Appellees, vs. SECURITY PACIFIC NATIONAL BANK, a National Banking Association, Cross-Defendant/ Appellant.	ORDER

The panel will delay ruling on the pending motion to vacate judgment for lack of jurisdiction until the en banc court renders its decision in Pacemaker Diagnostic

Clinic of America, Inc., v. Instromedix, Inc., Nos. 82-3152 and 82-3182.

FOR THE COURT:

PHILLIP B. WINBERRY
Clerk of Court

By: (Signature)
Roger T. Ritter
Senior Deputy Clerk

Filed
Nov. 15, 1983

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH L. POTSTADA, et al., Plaintiffs/ Appellants, vs. RICHARD D. FREEMAN, et al., Defendants/ Appellees.	)	CA Nos. 81-4515 81-4516 81-4517 81-4518 81-4552 81-4600
RANDOL PURVIANCE, et al., Cross-Claimants/ Appellees, vs. SECURITY PACIFIC NATIONAL BANK, a National Banking Association, Cross-Defendant/ Appellant.	)	ORDER

Before: WALLACE, SNEED, and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for

rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Further, this court's mandate is stayed until the panel has ruled on the pending motion to vacate judgment for lack of jurisdiction. The ruling on that motion has been delayed until the en banc court renders its decision in Pacemaker Diagnostic Clinic of America, Inc., v. Instromedix, Inc., Nos. 82-3152 and 82-3182.

Filed
Mar. 6, 1984

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH L. POTSTADA, et al., Plaintiffs/ Appellants, vs. RICHARD D. FREEMAN, et al., Defendants/ Appellees.	)	CA Nos. 81-4515 81-4516 81-4517 81-4518 81-4552 81-4600
RANDOL PURVIANCE, et al., Cross-Claimants/ Appellees, vs. SECURITY PACIFIC NATIONAL BANK, a National Banking Association, Cross-Defendant/ Appellant.	)	ORDER

Before: WALLACE, SNEED, and FARRIS, Circuit Judges.

Upon due consideration, the panel makes the following orders:

1. The motion to vacate judgment for lack of jurisdiction is denied;

2. The motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari is granted. Issuance of the mandate is stayed until April 15, 1984. See Fed. R. App. P. 41 (b).

DIRECTED VERDICT

RE GLASS-STEAGALL ACT

EXCERPT FROM RT 20131

THE COURT: As to the list of affirmative defenses that is contained in Security Pacific's motion for directed verdict, I will grant as to the failure to state a cause of action. . . violation of the National Bank Act and lack of subject matter jurisdiction.

Filed
Aug. 27, 1981

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEPH L. POTSTADA and LORETTA POTSTADA, et al., Plaintiffs, vs. RICHARD D. FREEMAN, et al., Defendants.	No. C-75-2456-SC POST-TRIAL ORDER NUMBER FOUR: MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR NEW TRIAL BY PLAINTIFF AND CROSS-CLAIMANTS
AND RELATED AND CONSOLIDATED CASES	

Plaintiffs and cross-defendants Lewis, et al., and cross-claimants/counter defendants Alldrins and Purviances have moved the Court for judgment notwithstanding the verdict against the defendant and counterclaiming banks on the 1933 Securities Act Section 12(1) and Corporations Code Section 25110 claims and affirmative defenses. The same parties move for

judgment notwithstanding the verdict against the defendant and counterclaiming leasing companies on their claims and the affirmative defense of failure of consideration. The same parties also move for a new trial against the defendant and counterclaiming banks and leasing companies on all claims and counterclaims decided against them. Plaintiff Melbostad and cross-claimant Purviances do not join in these motions on the breach of fiduciary duty claim which was decided in their favor.

Based on the briefs and supporting materials provided by the parties and its knowledge of the record in the case, the Court DENIES the motion.

IT IS SO ORDERED.

Dated: August 27, 1981

(Signature)
OWEN E. WOODRUFF, JR.
United States Magistrate

Filed
Aug. 28, 1981

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEPH L. POTSTADA and LORETTA POTSTADA, et al., Plaintiffs, vs. RICHARD D. FREEMAN, et al., Defendants.	No. C-75-2456-SC POST-TRIAL ORDER NUMBER NINE: APPLICATION BY LEASING COMPANY DEFENDANTS FOR ATTORNEYS' FEES
AND RELATED AND CONSOLIDATED CASES	

Capital Reserve Leasing Corporation, C.I.T. Corporation and Leasco Capital Equipment Corporation make application to this Court for the award of attorneys' fees.

The Court recognizes that where attorneys' fees and expenses are recoverable pursuant to a contract, as they are in this case, such fees and expenses may be

awarded as an item of costs. United States v. Standard Oil Co., 156 F.2d 312, 315 (9th Cir. 1946). The Court directed the parties to make their application for attorneys' fees to the Court and referred the parties to certain of the leading cases on the issue of the amount of attorneys' fees for guidance as to factors that bear upon the issue. See, Orders entered herein on July 10, 1981 and July 15, 1981. Although the factors set out in those cases govern the award in statutory and equitable fund cases and it would not be an abuse of discretion for this court not to follow those guidelines in this case, See Gluck v. American Protection Industries, Inc., 619 F.2d 30, 3233 (9th Cir. 1980), the Court has considered those factors as discussed below in arriving at its decision. The Court, however, is not required to and does not make precise calculations on the record. Manhart v. City of Los Angeles,

Dept. of Water, ____ F.2d ____ (9th Cir. 1981) (slip op. 3891).

The Court in reviewing the attorneys' fees requested in this application has considered certain of the Kerr-Johnson guidelines, See Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (9th. 1975), cert. denied, 425 U.S. 951 (1976) following Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). In addition, the Court has examined the "lodestar" requested to insure that the number of hours expended and the hourly rates claimed are reasonable. Cf. Lindy Brothers Builders Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973) (Lindy I) and on appeal after remand at 540 F.2d 102 (3rd Cir. 1976) (Lindy II).

Although there are twelve Kerr- Johnson factors, the Court has focused on six which are particularly applicable to this

case: the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, and the experience, reputation and ability of the attorneys.

As to these factors, the Court notes that this case required more than five years from the filing of the complaint to the rendering of judgment. The trial itself required ten months and generated over 30,000 pages of transcript. After more than three years of pretrial preparation plaintiffs substituted new counsel and filed an amended consolidated complaint which contained more than a dozen causes of action and defenses. Some of these theories, then alleged for the first time, were novel and difficult because they went to areas of the law where there

is either a conflict in the Circuits or the law of the Ninth Circuit is itself unclear as applied to the facts of this case.

It is the Court's view, based on its own knowledge of the case and supported by the papers submitted by the parties, that the time and labor required in litigating this case was great, that the novelty and difficulty of the questions involved was considerable, and that the attorneys performed with the degree of skill required to perform the legal services properly. In addition, it is apparent that attorneys involved in this case were precluded from other employment to a great extent during the time the case was in preparation and at trial. As to the experience of the attorneys, their papers in support of this application make the record clear. As to the ability of the attorneys, the Court is of the view that they have performed well

in circumstances that required endurance, ingenuity and diligence. The customary fee factor is considered below as part of the lodestar analysis.

The Court has also examined the declarations supporting the requested fees. The Court notes that the hourly fees claimed by the various attorneys and paralegals are reasonable, as are the number of hours claimed. These defendants, however, are less clear as to what the total amount of the request is. As to Leasco, the amount of the award is discussed below. As to Capital Reserve, a total of $222,891 appears supported (see July 22, 1981 Declaration of Wong and June 25, 1981 Declaration of Spence). As to C.I.T., the total figure supported is $59,280 (see July 22, 1981 Declaration of Wong).

The Court has considered the objections raised by plaintiffs and finds that, with the exception of matters discussed

below; no adjustments in the requested sums are required.

The plaintiffs are correct that the recovery of attorneys' fees in this case are contractual and that as to defendant Leasco the contract provides for less than complete recovery of attorneys' fees in this case. Paragraph twelve of the Leasco agreement provides in pertinent part: "Lessee shall also be liable for and shall pay to Lessor all expenses incurred by Lessor in connection with the enforcement of any of Lessor's remedies, including . . . legal expenses and reasonable attorneys' fees of 20% of the total unpaid balance of the term of this lease." Accordingly, Leasco is limited to 20% of the balance remaining on each individual lease and may recover only that amount as to that plaintiff.

As to C.I.T. and Capital Reserve, the plaintiffs' argument is correct insofar as

it would require apportionment of the award among plaintiffs who had equipment lease obligations with each leasing company. Plaintiffs who had no contractual obligation with a leasing company cannot be assessed fees. However, it is sufficient that a plaintiff had such an obligation; it is not required that a leasing company assert against a plaintiff a counterclaim.

In summary, the Court rules as follows:

As to Leasco, the award of attorneys' fees is limited to 20% of "the total unpaid rental" of each lease. Counsel for Leasco is directed to submit a declaration which specifies the total unpaid rental as to each plaintiff against whom Leasco prevailed and computing the 20% recovery. Further, Leasco's counsel is directed to submit an order to the Court which reflects the recovery of fees computed in the declaration.

As to C.I.T. and Capital Reserve, counsel is to submit an order in accordance with the above findings as to the reasonable amount of attorneys' fees to be awarded to each leasing company and apportioning that amount equally among those parties who had contractual obligations with each such company.

IT IS SO ORDERED.

Dated: August 27, 1981

(Signature)
OWEN E. WOODRUFF, JR.
United States Magistrate

Filed
Aug. 28, 1981

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEPH L. POTSTADA and LORETTA POTSTADA, et al., Plaintiffs, vs. RICHARD D. FREEMAN, et al., Defendants.	No. C-75-2456-SC POST-TRIAL ORDER NUMBER TEN: COMMERCIAL BANK OF SAN FRANCISCO, JOHN SMITH AND WILLIAM SARSFIELD MOTION FOR ORDER AWARDING ATTORNEYS' FEES AND NON-STATUTORY COSTS
AND RELATED AND CONSOLIDATED CASES	

Commercial Bank of San Francisco, John Smith and William Sarsfield move the Court for an order awarding them attorneys' fees and costs pursuant to the terms of the promissory notes given the Bank by certain of the plaintiffs in this case. Specifically, these defendants ask for an award of $252,902.67 to be assessed sever-

ally against thirteen plaintiffs as to whom the defendants prevailed.

The Court recognizes that where attorneys' fees and expenses are recoverable pursuant to a contract, as they are in this case, such fees and expenses may be awarded as an item of costs. United States v. Standard Oil Co., 156 F.2d 312, 315 (9th Cir. 1946). The Court directed the parties to make their application for attorneys' fees to the Court and referred the parties to certain of the leading cases on the issue of the amount of attorneys' fees for guidance as to factors that bear upon the issue. See, Orders entered herein on July 10, 1981 and July 15, 1981. Although the factors set out in those cases govern the award in statutory and equitable fund cases and it would not be an abuse of discretion for this court not to follow those guidelines in this case, See Gluck v. American Protection Industries,

Inc., 619 F.2d 30, 3233 (9th Cir. 1980), the Court has considered those factors as discussed below in arriving at its decision. The Court, however, is not required to and does not make precise calculations on the record. Manhart v. City of Los Angeles, Dept. of Water, ____ F.2d ____ (9th Cir. 1981) (slip op. 3891).

The Court in reviewing the attorneys' fees requested in this application has considered certain of the Kerr-Johnson guidelines, See Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (9th. 1975), cert. denied, 425 U.S. 951 (1976) following Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). In addition, the Court has examined the "lodestar" requested to insure that the number of hours expended and the hourly rates claimed are reasonable. Cf. Lindy Brothers Builders Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161

(3rd Cir. 1973) (Lindy I) and on appeal after remand at 540 F.2d 102 (3rd Cir. 1976) (Lindy II).

Although there are twelve Kerr- Johnson factors, the Court has focused on six which are particularly applicable to this case: the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, and the experience, reputation and ability of the attorneys.

As to these factors, the Court notes that this case required more than five years from the filing of the complaint to the rendering of judgment. The trial itself required ten months and generated over 30,000 pages of transcript. After more than three years of pretrial preparation plaintiffs substituted new counsel

and filed an amended consolidated complaint which contained more than a dozen causes of action and defenses. Some of these theories, then alleged for the first time, were novel and difficult because they went to areas of the law where there is either a conflict in the Circuits or the law of the Ninth Circuit is itself unclear as applied to the facts of this case.

It is the Court's view, based on its own knowledge of the case and supported by the papers submitted by the parties, that the time and labor required in litigating this case was great, that the novelty and difficulty of the questions involved was considerable, and that the attorneys performed with the degree of skill required to perform the legal services properly. In addition, it is apparent that attorneys involved in this case were precluded from other employment to a great extent during the time the case was in preparation and

at trial. As to the experience of the attorneys, their papers in support of this application make the record clear. As to the ability of the attorneys, the Court is of the view that they have performed well in circumstances that required endurance, ingenuity and diligence. The customary fee factor is considered below as part of the lodestar analysis.

The Court has also examined the lodestar amount requested by Commercial Bank of San Francisco, John Smith and William Sarsfield. First, the Court notes that the hourly fees claimed by the various attorneys and paralegal assistants are reasonable, as are the non-statutory cost figures. The court has scrutinized the declarations submitted in support of the amount requested and finds that the hours claimed to have been expended in this litigation are reasonable. In addition, the Court has examined the method of Com-

mercial Bank of San Francisco, John Smith and William Sarsfield in arriving at the total figure of fees and costs and finds that the method is sound and the sum reasonable.

The Court has considered the objections raised by plaintiffs, some of which the defendants here have cured during the briefing schedule, and finds nothing which merits adjusting the amount requested.

Accordingly, for the reasons set out above, the Court GRANTS the motion of these parties and awards to them attorneys' fees and other non-statutory costs from the plaintiffs below in the amount of $252,902.67 to be severally assessed as follows:

As to the following seven plaintiffs, $18,722,18 each:

1. Alvin W. and Catherine Dill
2. John C. and Patricia M. Dumars
3. Gaar Edwards
4. Robert L. and Betty Harrington
5. Ronald and Elizabeth Hayman

6. Shoge and Janet May Kimura
7. Philip R. and Rina Milano

As to the following six plaintiffs,

in the amounts specified:

1. Calvin and Jacqueline A. Benton- $20,598.36;
2. Clarence N. and Louise T. Copeland - $19,919.66;
3. Howard D. Daniel - $19.769.36;
4. Jared E. and Elsie E. Haight - $20,444.36;
5. Leo J. and Osie B. Lawrence - $21,073.36;
6. Eugene P. and Mary Olga Liston - $22,476.21.

IT IS SO ORDERED

Dated: August 27, 1981

(Signature)
OWEN E. WOODRUFF, JR.
United States Magistrate

Filed
Aug. 28, 1981

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEPH L. POTSTADA and LORETTA POTSTADA, et al., Plaintiffs, vs. RICHARD D. FREEMAN, et al., Defendants.	No. C-75-2456-SC POST-TRIAL ORDER NUMBER ELEVEN: MOTION BY SECURITY PACIFIC NATIONAL BANK TO AWARD ATTORNEYS' FEES
AND RELATED AND CONSOLIDATED CASES	

Security Pacific National Bank makes application to the Court of an order awarding it attorneys' fees and costs pursuant to the terms of the promissory notes given the Bank by the plaintiff in this case. Specifically, the Bank asks for an award of $1,522,527 to be assessed against each of the 32 plaintiffs in equal shares of $47,578.97.

The Court recognizes that where attorneys' fees and expenses are recoverable pursuant to a contract, as they are in this case, such fees and expenses may be awarded as an item of costs. United States v. Standard Oil Co., 156 F.2d 312, 315 (9th Cir. 1946). The Court directed the parties to make their application for attorneys' fees to the Court and referred the parties to certain of the leading cases on the issue of the amount of attorneys' fees for guidance as to factors that bear upon the issue. See, Orders entered herein on July 10, 1981 and July 15, 1981. Although the factors set out in those cases govern the award in statutory and equitable fund cases and it would not be an abuse of discretion for this court not to follow those guidelines in this case, See Gluck v. American Protection Industries, Inc., 619 F.2d 30, 3233 (9th Cir. 1980), the Court has considered those factors as

discussed below in arriving at its decision. The Court, however, is not required to and does not make precise calculations on the record. Manhart v. City of Los Angeles, Dept. of Water, ____ F.2d ____ (9th Cir. 1981) (slip op. 3891).

The Court in reviewing the attorneys' fees requested in this application has considered certain of the Kerr-Johnson guidelines, See Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (9th. 1975), cert. denied, 425 U.S. 951 (1976) following Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). In addition, the Court has examined the "lodestar" requested to insure that the number of hours expended and the hourly rates claimed are reasonable. Cf. Lindy Brothers Builders Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973) (Lindy I) and on appeal

after remand at 540 F.2d 102 (3rd Cir. 1976) (Lindy II).

Although there are twelve Kerr- Johnson factors, the Court has focused on six which are particularly applicable to this case: the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, and the experience, reputation and ability of the attorneys.

As to these factors, the Court notes that this case required more than five years from the filing of the complaint to the rendering of judgment. The trial itself required ten months and generated over 30,000 pages of transcript. After more than three years of pretrial preparation plaintiffs substituted new counsel and filed an amended consolidated com-

plaint which contained more than a dozen causes of action and defenses. Some of these theories, then alleged for the first time, were novel and difficult because they went to areas of the law where there is either a conflict in the Circuits or the law of the Ninth Circuit is itself unclear as applied to the facts of this case.

It is the Court's view, based on its own knowledge of the case and supported by the papers submitted by the parties, that the time and labor required in litigating this case was great, that the novelty and difficulty of the questions involved was considerable, and that the attorneys performed with the degree of skill required to perform the legal services properly. In addition, it is apparent that attorneys involved in this case were precluded from other employment to a great extent during the time the case was in preparation and

at trial. As to the experience of the attorneys, their papers in support of this application make the record clear. As to the ability of the attorneys, the Court is of the view that they have performed well in circumstances that required endurance, ingenuity and diligence. The customary fee factor is considered below as part of the lodestar analysis.

The Court has also examined the lodestar amount requested by Security Pacific National Bank. First, the Court notes that the hourly fees claimed by the various attorneys and paralegal assistants are reasonable, as are the non-statutory cost figures. The court has scrutinized the declarations submitted in support of the amount requested and finds that the hours claimed to have been expended in this litigation are reasonable. In addition, the Court has examined the method of Security Pacific National Bank in arriving at the

total figure of fees and costs and finds that the method is sound and the sum reasonable.

The Court has considered the objections raised by plaintiffs and finds nothing which merits adjusting the amount requested. However, one argument must be specifically addressed. Plaintiffs allege that Security Pacific has shown bad faith and that the Court should exercise its inherent equitable power to deny the request for attorneys' fees in its entirety. This the Court will not do. To the extent that the alleged bad faith is a factual question, the jury rejected it and the Court finds nothing in the post-trial papers that requires a different view be taken now. The Court agrees with the plaintiffs that the Court has the power to grant the equitable relief they seek where an appropriate factual, setting is present. Such facts are not here present.

Accordingly, for the reasons set out above, the Court GRANTS the application of Security Pacific National Bank and awards to it attorneys' fees and other non-statutory costs from the plaintiffs in the amount of $1,522,527 to be assessed against each of the 32 plaintiffs in equal shares of $47,578.97.

IT IS SO ORDERED

Dated: August 27, 1981

(Signature)
OWEN E. WOODRUFF, JR.
United States Magistrate

Filed
Aug. 28, 1981

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEPH L. POTSTADA and LORETTA POTSTADA, et al., Plaintiffs, vs. RICHARD D. FREEMAN, et al., Defendants.	No. C-75-2456-SC POST-TRIAL ORDER NUMBER EIGHTEEN: PLAINTIFFS' MOTION FOR AN EVIDENTIARY HEARING ON THE QUESTION OF JUROR UNANIMITY
AND RELATED AND CONSOLIDATED CASES	

On the last day of the briefing schedule ordered by the Court for all post-trial motions, the plaintiffs filed notice of an ex parte motion for an evidentiary hearing on the question of juror unanimity seeking an order from this Court directing the Clerk of the Court to issue subpoenaes ordering that the trial jurors in this case appear for a hearing before the Court.

Based on the plaintiffs' Memorandum of Points and Authorities in Support of the motion, the briefs submitted by the parties in connection with plaintiffs' motion for judgment notwithstanding the verdict and for a new trial to the extent that they address the issue of jury unanimity, and on its knowledge of the record in the case, the Court DENIES the motion.

IT IS SO ORDERED

Dated: August 27, 1981

(Signature)
OWEN E. WOODRUFF, JR.
United States Magistrate

STATUTES

28 U.S.C. §636(c) provides, in pertinent part: Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case when specially designated to exercise such jurisdiction by the district court or courts he serves.

12 U.S.C. §24(7) provides, in pertinent part: To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by

loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: Provided, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.

12 U.S.C. §378 provides, in pertinent part: Dealers in securities engaging in banking business; individuals or associations engaging in banking business; examinations and reports; penalties

(a) After the expiration of one year

after June 16, 1933, it shall be unlawful:

(1) for any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: Provided, That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities, or issuing

securities, to the extent permitted to national banking associations by the provisions of section 24 of this title. . .

(2) For any person, firm, corporation, association, business trust, or other similar organization to engage, to any extent whatever with other than his or its officers, agents or employees, in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor, unless such person, firm, corporation, association, business trust, or other similar organization (A) shall be incorporated under, and authorized to engage in such business by, the laws of the United States or of any State, Territory or District, and subjected, by the laws of the United States, or of the State, Territory, or District wherein located, to examination and regulation, or

(B) shall be permitted by the United States, any State, territory, or district to engage in such business and shall be subjected by the laws of the United States, or such State, territory, or district to examination and regulations or, (C) shall submit to periodic examination by the banking authority of the State, Territory, or District where such business is carried on and shall make and publish periodic reports of its condition, exhibiting in detail its resources and liabilities, such examination and reports to be made and published at the same times and in the same manner and under the same conditions as required by the law of such State, Territory, or District in the case of incorporated banking institutions engaged in such business in the same locality.

(b) Whoever shall willfully violate any of the provisions of this section

shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both, and any officer, director, employee, or agent of any person, firm, corporation, association, business trust, or other similar organization who knowingly participates in any such violation shall be punished by a like fine or imprisonment or both. June 16, 1933, c.89, §21, 48 Stat. 189; Aug. 23, 1935, c.614, §303, 49 Stat. 707.

PLAINTIFF'S EXHIBIT 95-2

SECURITY PACIFIC NATIONAL BANK -

INTERNAL COMMUNICATION

To: Mr. John R. Jenkins,
Regional Vice President
5-102

From: A. E. Dalshaug,
Senior Vice President

Dept. or Br.: North Coastal Divsion 5-108

Date: February 22, 1973

Subject: DIVERSIFIED MONETARY SYSTEMS REFERRALS, SAN FRANCISCO MAIN OFFICE

While you were absent on vacation, a number of unsecured five-year instalment loans cleared through the Northern Calif-

ornia Loan Committee, which were booked at San Francisco Main Office, and which were referred by Diversified Monetary Systems. The purpose of this memorandum is to record some thoughts and concerns regarding the afore-mentioned credit extensions, as evidenced by the Committee:

(1) It is very difficult to tell from the Credit Commitment Reports clearing each individual transaction, whether or not that credit represents an acceptable risk, and whether or not the credit is rational from every viewpoint.

Specifically, the following information would greatly benefit the reader:

(a) Where does the obligant live --- does he represent a good potential customer for our Bank?

(b) How long has he been in practice (if self-employed) or in his present employment? History of income, rather than a statement of one-year income, would certainly help. Most of the Credit Commitment Reports show one-year income figures, although there was an indication that several years' tax returns were reviewed by the Lending Officer. The usual three-year income expense presentation is warranted, con-

sidering the size of the loans being made under the program.

(c) Who is the borrower's present bank --- some of the borrowers have a significant amount of cash, which we obviously should like to have an opportunity to have on deposit.

(2) Some of the borrowers had high income, but negligible net worth. Where lack of sound secondary repayment source exists (because of negligible net worth), we should obtain disability insurance to provide income to service the bank debt in the event the borrower

becomes ill, or is involved in accidental disability.

(3) We have adopted a practice of having each borrower come into the branch, and, at that time, inform him specifically that his loan is based on his credit alone, and that the Bank does not endorse, guarantee, or support the investment and has no connection with Diversified Monetary Systems. It was felt that a form letter should be prepared to be signed by the borrower to put as disclaimers in writing to become a permanent part of our file.

Most of the credits I have reviewed represent acceptable risks, and most of the borrowers are people of high income, whom

we would be pleased to have as customers. To that extent, I endorse this business acquisition program. You are aware, however, I am sure, of the very embarrassing publicity the Union Bank recently suffered in Los Angeles through its involvement in financing individuals on a referral basis for tax savings investments in a program very similar to this. It is an unfortunate fact that our willingness to make available funds for investment in programs of Diversified Monetary Systems connect us irrefutably in the mind of the borrower with Diversified Monetary Systems, our protestations to the contrary notwithstanding. The best way to avoid problems in the future, is to get the proper documentation now, and you should work with Frank Higham to see what can be done. I think further that we should insist on each borrower becoming a customer --- if we do that, we can take the position that

the purpose of our loan was to gain a customer, and not to facilitate an investment. If we fail to insist on an account, there is no question, we made the loan for the loan's sake --- which puts it in the realm of discounting paper.

I understand some $2,000,000 of loans have already been booked, so our risk to a class-action suit, at some point in time, is already in the books. The chance of one of these borrowers becoming disenchanted and choosing to enjoin us in an action, is uncomfortably strong.

Please discuss this with me prior to March 15th.

(Signature)

AED:ib

cc: Mr. L. P. Johnson,
Executive Vice President

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO PLAINTIFFS AND CROSS-DEFENDANTS ALLDRIN

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of cross-claimants and cross-defendants, Walden E. and Louis Alldrin and on the cross-claims against them, and against cross-defendant Alldrin Farms, Inc., initial judgment having been entered on June 23, 1981, and the Court having ruled on the

parties' post-trial motions.

IT IS ORDERED AND ADJUDGED that cross-claimants recover of cross-defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $65,000 and costs in the sum of $3,602.

IT IS FURTHER ORDERED AND ADJUDGED that cross-claimants take nothing on their claims against cross-defendants Security Pacific National Bank, John F. Smith, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the cross-complaint, and each claim therein, be dismissed as to those cross-defendants and each of them; that those cross-defendants recover of the cross-claimants, and each of them, their

costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED:

(1) That Security Pacific national Bank recover of cross-defendants Alldrin, and each of them, the principal sum of $44,000, plus interest through the date of judgment in the sum of $25,776.59 and at the legal rate thereafter and costs, including reasonable attorneys' fees of $52,999; and

(2) That Leasco Capital Equipment Corporation recover of cross-defendants Alldrin, and each of them, the principal sum of $44,528 plus interest through the date of judgment in the sum of $21,032.80 and at the legal rate thereafter and costs, including reasonable attorneys fees of $9,048.

(3) That Capital Reserve Leasing Corporation recover of cross-defendants Alldrin, and each of them, the principal sum of $27,239, plus interest through the

date of judgment in the sum of $12,629.78 and at the legal rate thereafter and costs, including reasonable attorneys' fees of $14,367; and

(4) That CIT Corporation recover of cross-defendants Alldrin, including Alldrin Farms, Inc., and each of them, the principal sum of $14,708, plus interest through the date of judgment in the sum of $14,708, plus interest through the date of judgment in the sum of $5,352.36 and at the legal rate thereafter and costs, including reasonable attorneys' fees of $30,285.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.

United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
BENTON

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Calvin and Jacqueline A. Benton and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $73,000 plus and costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $86,962, plus interest through the date of judgment in the sum of $28,209 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $50,971;

(2) That Commercial Bank of San Francisco recover of counter-defendants, and each of them, the principal sum of $42,029, plus interest through the date of judgment in the sum of $37,185 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $20,934;

(3) That Leasco Capital Equipment Corporation recover of counter-defendants, and each of them, the principal sum of $9,875 plus interest through the date of judgment in the sum of $4,097 and at the

legal rate thereafter and costs, including reasonable attorneys' fees, of $2,117; and

(4) That Capital Reserve Leasing Corporation recover of counter-defendants, and each of them, the principal sum of $7,002, plus interest through the date of judgment in the sum of $4,245 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
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Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
BRYNER

This action having come on for trial

before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Sergius and Frances A. Bryner and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally the sum of $10,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED

that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each; of them; that those defendants recover of the plaintiffs, and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $19,548, plus interest through the date of judgment in the sum of $6,877 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed

entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO PLAINTIFFS AND COUNTER-DEFENDANTS COPELAND

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Clarence N. and Louise T. Copeland and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $40,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs, and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $44,806, plus interest through the date of judgment in the sum of $15,075 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $50,890;

(2) That Commercial Bank of San Francisco recover of counter-defendant, Clarence N. Copeland the principal sum of $30,644, plus interest through the date of judgment in the sum of $28,069 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $20,255;

(3) That Leasco Capital Equipment Corporation recover of counter-defendants, and each of them, the principal sum of $4,512 plus interest through the date of judgment in the sum of $2,666 and at the legal rate thereafter and costs, including

reasonable attorneys' fees, of $1,045; and

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER-DEFENDANTS
DANIEL

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiff and counter-defendant, Howard D. Daniel and on the counterclaims against him, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial

motions,

IT IS ORDERED AND ADJUDGED that plaintiff recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $97,500 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff take nothing on his claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiff their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaim:

(1) That Security Pacific National Bank recover of counterdefendant, the principal sum of $84,481, plus interest through the date of judgment in the sum of $26,687 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $50,936;

(2) That Commercial Bank of San Francisco recover of counter-defendant, the principal sum of $77,691, plus interest through the date of judgment in the sum of $66,186 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $20,105;

(3) That Leasco Capital Equipment Corporation recover of counter-defendant, the principal sum of $14,998 plus interest through the date of judgment in the sum of $7,085 and at the legal rate thereafter and costs, including reasonable attorneys'

fees of $3,142; and

(4) That Capital Reserve Leasing Corporation recover of counter-defendant, the principal sum of $17,985, plus interest through the date of judgment in the sum of $10,900 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER-DEFENDANTS
DILL

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Alvin W. and Catherine Dill and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alain C. Temp, and each of them, jointly and severally, the sum of $19,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $25,813, plus interest through the date of judgment in the sum of $9,011 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $57,115;

(2) That Commercial Bank of San Francisco recover of counterdefendant, Alvin W. Dill, the principal sum of $13,076, plus interest through the date of judgment in the sum of $10,912 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $19,058;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that

date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFF
DUFF

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiff John Duff, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiff recover of defendants Diversified Monetary

Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $40,000 and costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff take nothing on his claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiff their costs of suit.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro

tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
DUMARS

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counterdefendants, John C. and Patricia M. Dumars and on the counterclaim against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial

motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $42,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $26,094, plus interest through the date of judgment in the sum of $9,287 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

(2) That Commercial Bank of San Francisco recover of counterdefendants, and each of them, the principal sum of $58,002, plus interest through the date of judgment in the sum of $45,593 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $19,058;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that

date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFF
AND COUNTER-DEFENDANT
EDWARDS

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiff and counterdefendant, Gaar Edwards and on the counterclaims against him, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial

motions,

IT IS ORDERED AND ADJUDGED that plaintiff recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $26,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff take nothing on his claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiff their costs of

suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendant, the principal sum of $17,856, plus interest through the date of judgment in the sum of $6,082 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

(2) That Commercial Bank of San Francisco recover of counterdefendant, the principal sum of $22,101, plus interest through the date of judgment in the sum of $19,276 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $19,058;

(3) That Capital Reserve Leasing Corporation recover of counterdefendant, the principal sum of $3,732, plus interest through the date of judgment in the sum of $2,099 and at the legal rate thereafter

and costs, including reasonable attorneys' fees, of $14,367.

(4) That Leasco Capital Equipment Corporation recover of counterdefendant, the principal sum of $8,024 plus interest through the date of judgment in the sum of $5,066.60 and at the legal rate thereafter, and costs, including reasonable attorneys' fees of $1,747.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO PLAINTIFFS AND COUNTER DEFENDANTS FISH

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counterdefendants, Martin and Ruth E. Fish and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally the sum of $22,500 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs, and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $45,441, plus interest through the date of judgment in the sum of $15,923 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $49,171;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFF
AND COUNTER DEFENDANT
FOX

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiff and counterdefendant, Maurice Fox and on the counterclaims against him, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $18,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiff their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendant, the principal sum of $26,956, plus interest through the date of judgment in the sum of $6,936 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

(2) That Capital Reserve Leasing Corporation recover of counterdefendant, the principal sum of $9,000, plus interest through the date of judgment in the sum of $5,083 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO PLAINTIFFS AND COUNTER DEFENDANTS FRY

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counterdefendants, Gary A. and Karen C. and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally the sum of $10,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs, and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $19,624, plus interest through the date of judgment in the sum of $6,845 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,553;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
HAIGHT

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counterdefendants, Jared E. and Elsie E. Haight and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $34,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaim:

(1) That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $35,075, plus interest through the date of judgment in the sum of $11,532 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $50,898;

(2) That Commercial Bank of San Francisco recover of counterdefendants, and each of them, the principal sum of $33,433, plus interest through the date of judgment in the sum of $29,595 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $20,780;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that

date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO PLAINTIFFS AND COUNTER DEFENDANTS HAMAJI

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counterdefendants, Roy S. and Mary K. Hamaji and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally the sum of $21,250 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs, and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $42,449, plus interest through the date of judgment in the sum of $12,700 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
HARRINGTON

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Robert L. and Betty Harrington and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $27,500 plus and costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $14,630, plus interest through the date of judgment in the sum of $5,083 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

(2) That Commercial Bank of San Francisco recover of counterdefendants, and each of them, the principal sum of $28,217, plus interest through the date of judgment in the sum of $24,635 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $19,058;

(3) That Leasco Capital Equipment Corporation recover of counterdefendants, and each of them, the principal sum of $5,999 plus interest through the date of judgment in the sum of $3,776 and at the

legal rate thereafter and costs, including reasonable attorneys' fees, of $1,342; and

(4) That Capital Reserve Leasing Corporation recover of counterdefendants, and each of them, the principal sum of $6,394, plus interest through the date of judgment in the sum of $3,284 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO PLAINTIFFS AND COUNTER DEFENDANTS HAUG

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counterdefendants, Ronald and Marcia Haug and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $30,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs, and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $46,399, plus interest through the date of judgment in the sum of $16,175 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $51,500;

(2) That Leasco Capital Equipment Corporation recover of counterdefendants, and each of them, the principal sum of $3,453 plus interest through the date of judgment in the sum of $2,103 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $833; and

(3) That Capital Reserve Leasing Corporation recover of counterdefendants, and each of them, the principal sum of $10,504, plus interest through the date of judgment in the sum of $5,662 and at the legal rate thereafter and costs, including

reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
HAYMAN

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counterdefendants, Ronald and Elizabeth Hayman and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $55,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $40,193, plus interest through the date of judgment in the sum of $11,962 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

(2) That Commercial Bank of San Francisco recover of counterdefendants, and each of them, the principal sum of $49,268, plus interest through the date of judgment in the sum of $37,327 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $19,058;

(3) That Capital Reserve Leasing Corporation recover of counterdefendants, and each of them, the principal sum of $20,056, plus interest through the date of judgment in the sum of $10,963 and at the

legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
PACIFIC WOOD/JACKSON

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counterdefendants, Pacific Wood Preserving Corporation and Richard Jackson and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court

having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independent Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally the sum of $25,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that

those defendants recover of the plaintiffs, and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $49,468, plus interest through the date of judgment in the sum of $17,254 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
KIMURA

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counterdefendants, Shoge and Janet May Kimura and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $26,000 plus costs in the sum of $75,399;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendants, and each of them, the principal sum of $35,839, plus interest through the date of judgment in the sum of $12,509 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

(2) That Commercial Bank of San Francisco recover of counterdefendants, and each of them, the principal sum of $15,990, plus interest through the date of judgment in the sum of $10,510 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $19,058;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that

date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
LAWRENCE

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counterdefendants, Leo J. and Osie B. Lawrence and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $156,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counterdefendant, Leo J. Lawrence, the principal sum of $215,799, plus interest through the date of judgment in the sum of $68,228 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $50,978;

(2) That Commercial Bank of San Francisco recover of counterdefendants, and each of them, the principal sum of $66,219 plus interest through the date of judgment in the sum of $60,655 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $21,409;

(3) That Leasco Capital Equipment Corporation recover of counterdefendants, and each of them, the principal sum of $12,953 plus interest through the date of judgment in the sum of $6,120 and at the

legal rate thereafter and costs, including reasonable attorneys' fees, of $2,733; and

(4) That Capital Reserve Leasing Corporation recover of counterdefendants, and each of them, the principal sum of $17,455, plus interest through the date of judgment in the sum of $8,092 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO PLAINTIFFS AND COUNTER DEFENDANTS LEWIS

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Bernard I. and Barbara Lewis and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly severally the sum of $26,250 and costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs, and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific national Bank recover of counter-defendants, and each of them, the principal sum of $37,818, plus interest through the date of judgment in the sum of $13,202 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

(2) That CIT Corporation recover of counter-defendants, and each of them, the principal sum of $14,708, plus interest through the date of judgment in the sum of $5,352 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $30,285.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes and judgment between

the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
LISTON

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Eugene P. and Mary Olga Liston and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alain C. Temp, and each of them, jointly and severally, the sum of $122,000 plus and costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of Counterdefendants, and each of them, the principal sum of $105,059, plus interest through the date of judgment in the sum of $34,080 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $51,043;

(2) That Commercial Bank of San Francisco Recover of counter-defendants, and each of them, the principal sum of $83,109, plus interest through the date of judgment in the sum of $72,791 and at the legal rate of thereafter and costs, including reasonable attorneys' fees, of $22,812;

(3) That Leasco Capital Equipment Corporation recover of counter-defendants, and each of them, the principal sum of $20,264 plus interest through the date of

judgment in the sum of $11,401 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $4,195; and

(4) That Capital reserve Leasing Corporation recover of counter-defendants, and each of them, the principal sum of $36,219 plus interest through the date of judgment in the sum of $20,415 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, Nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th date of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO PLAINTIFFS AND COUNTER DEFENDANTS LUNDELL

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Lowell and Joan S. Lundell and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly severally the sum of $12,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendant recover of the plaintiffs, and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

That Security pacific National Bank recover of counter-defendants, and each of them, the principal sum of $24,207, plus interest through the date of judgment in the sum of $8,378 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO PLAINTIFFS AND COUNTER DEFENDANTS McKEE

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, William D. and Marsha McKee and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr. Richard D. Freeman, Conrad Robert Temp and Alain C. Temp, and each of them, jointly and severally the the sum of $28,700 plus costs in the sum of $75,399.

IT IS FURTHER ORDER AND ADJUDGED that plaintiffs take nothing on the claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs, and each of them, their costs of suit; and

IT IS FURTHER ORDER AND ADJUDGED with respect to the counterclaims:

That Security Pacific National Bank recover of counter-defendants, and each of them, the principal sum of $57,489, plus interest through the date of judgment in the sum of $14,790 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Date at San Francisco, California this 18th day of september, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO PLAINTIFFS AND COUNTER-DEFENDANTS MELBOSTAD

This action having been come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiff James Melbostad and on the counterclaims against him, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that

plaintiff recover of defendants Commercial Bank of San Francisco, Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alain C. Temp, and each of them, jointly and severally, the sum of $23,698 plus costs against such defendants, with the exception of Commercial Bank of San Francisco, in the sum of $75,339.81.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff recover of defendant and counterclaimant Commercial Bank of San Francisco costs of $700 and reasonable attorneys' fees of $10,000; and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff takes nothing on his claims against defendants Security Pacific National Bank, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and

CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiff, his costs of suit.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
MILANO

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Philip R. and Rina Milano and on the counter-claims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $30,500 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific national Bank, Commercial Bank of San Francisco, John F. SMith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counter-defendants, and each of them, the principal sum of $40,588, plus interest through the date of judgment in the sum of $14,056 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

(2) That Commercial Bank of San Francisco recover of counter-defendants, and each of them, the principal sum of $12,554, plus interest through the date of judgment i the sum of $8,674 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $19,058;

(3) That Capital Reserve Leasing Corporation recover of counter-defendants, and each of them, the principal sum of $7,879, plus interest through the date of

judgment in the sum of $4,119 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDER AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes and the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER-DEFENDANTS
MOYLAN

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, John D. and Margaret J. Moylan and on the counter-claims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally the sum of $7,500 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counter-defendants, and each of them, the principal sum of $12,957, plus interest through the date of judgment i the sum of $4,629 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

(2) That Capital Reserve Leasing Corporation recover of counter-defendants, and each of them, the principal sum of $2,402, plus interest through the date of judgment in the sum of $997 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between

/ /

the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
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Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER-DEFENDANTS
OUYE

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, James M. and Nancy Y. Ouye and o the counter-claims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally the sum of $45,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific national Bank, Commercial Bank of San Francisco, John F. SMith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counter-defendants, and each of them, the principal sum of $74,764, plus interest through the date of judgment in the sum of $19,235 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,539;

(2) That Capital Reserve Leasing Corporation recover of counter-defendants, and each of them, the principal sum of $14,362, plus interest through the date of judgment in the sum of $6,653 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that

date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER-DEFENDANTS
PAPPAS

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Robert H. and Maria Pappas and on the counter claims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally the sum of $8,250 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. SMith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counter-defendants, and each of them, the principal sum of $7,155, plus interest through the date of judgment in the sum of $2,746 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

(2) That Capital Reserve leasing Corporation recover of counter-defendants, and each of them, the principal sum of $9,372, plus interest through the date of judgment in the sum of $4,823 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23,1981, nunc pro tunc, and supersedes the judgment between

/ /

the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER DEFENDANTS
PEARSON

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Kent D. and Claire Pearson and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED AND ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alain C. Temp, and each of them, jointly and severally the sum of $16,000 plus costs in the sum of $75,399.

It is further ordered and adjudged that plaintiffs take nothing on their claims against defendants Security Pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them; that those defendants recover of the plaintiffs,

and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED with respect to the counterclaims:

That Security Pacific National Bank recover of counter-defendants, Kent D. Pearson, the principal sum of $32,255, plus interest through the date of judgment in the sum of $11,259 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $48,464;

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that dates.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO CROSS-CLAIMANTS AND CROSS-DEFENDANTS B. PURVIANCE

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of cross-claimants and cross-defendants, Billy Joe and Virginia Purviance and on the cross-claims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that cross-- - claimants recover of cross-defendants Security Pacific National Bank, Commercial Bank of San Francisco, Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $84,600 plus costs against such defendants, with the exception of Commercial Bank of San Francisco and Security Pacific National Bank, in the sum of $1,792.92.

IT IS FURTHER ORDERED AND ADJUDGED that cross-claimants recover additional costs in the sum of $448 from Commercial Bank of San Francisco and Security Pacific National Bank each, and reasonable attorneys' fees from Commercial Bank of San Francisco, in the sum of $15,000.

IT IS FURTHER ORDERED AND ADJUDGED

that cross-claimants take nothing on their claims against cross-defendants John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the cross-complaint, and each claim therein, be dismissed as to those cross-defendants and each of them; that those cross-defendants recover of the cross-claimants, and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED that cross-claimant Leasco Capital Equipment Corporation recover of cross-defendants Purviance, and each of them, the principal sum of $3,876, plus interest through the date of judgment in the sum of $1,602.72 and at the legal rate thereafter and costs, including reasonable attorneys' fees in the sum of $917.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed

entered effective June 23, 1981, nunc pro tunc, supersedes the judgment between the parties originally entered on that date.

Dated at San francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED JUDGMENT AS TO CROSS-CLAIMANTS AND CROSS-DEFENDANTS R. PURVIANCE

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States Magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of cross-claimants and cross-defendants, Randol and Betty Purviance on the cross-claims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties' post-trial motions,

IT IS ORDERED AND ADJUDGED that cross-claimants recover of cross-defendants Security Pacific National Bank, Commercial Bank of San Francisco, Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $84,600 plus costs against such defendants, with the exception of Commercial Bank of San Francisco and Security Pacific National Bank, in the sum of $1,792.92.

IT IS FURTHER ORDERED AND ADJUDGED that cross-claimants recover additional costs, in the sum of $448 from Commercial Bank of San Francisco and Security Pacific national Bank each, and reasonable attorneys' fees from Commercial Bank of San Francisco, in sum of $15,000.

IT IS FURTHER ORDERED AND ADJUDGED

that cross-claimants take nothing on their claims against cross-defendants John F. Smith, William Sarsfield, Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the cross-complaint, and each claim therein, be dismissed as to those cross-defendants and each of them; that those cross-defendants recover of the cross-claimants, and each of them, their costs of suit.

IT IS FURTHER ORDERED AND ADJUDGED that cross-claimant Leasco Capital Equipment Corporation recover of cross-defendants Purviance, and each of them, the principal sum of $3,876, plus interest through the date of judgment in the sum of $1,602.72 and at the legal rate thereafter and costs, including reasonable attorneys' fees, in the sum of$917.

IT IS FURTHER ORDERED AND ADJUDGED that this Amended Judgment shall be deemed

entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

POTSTADA v. FREEMAN) No.C 75-2456-SC
)
)

Related Actions

No. C 76-196 SC
No. C 76-1178 SC
No. C 76-2390 SC
No. C 76-2848 SC

AMENDED
JUDGMENT AS TO PLAINTIFFS
AND COUNTER-DEFENDANTS
ROTH

This action having come on for trial before the Court and a jury, the Honorable Owen E. Woodruff, Jr., United States magistrate, presiding by stipulation of the parties, the jury having unanimously rendered its Special Verdicts on each of the claims of plaintiffs and counter-defendants, Robert L. and Alberta M. Roth and on the counterclaims against them, initial judgment having been entered on June 23, 1981, and the Court having ruled on the parties'

post-trial motions,

IT IS ORDERED ADJUDGED that plaintiffs recover of defendants Diversified Monetary Systems, Inc., Economic Control Corporation, Continental Pacific Corporation, Independence Drilling Corporation, Walter Wilson Carter, Jr., Richard D. Freeman, Conrad Robert Temp and Alaine C. Temp, and each of them, jointly and severally, the sum of $35,000 plus costs in the sum of $75,399.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs take nothing on their claims against defendants Security pacific National Bank, Commercial Bank of San Francisco, John F. Smith, William Sarsfield Leasco Capital Equipment Corporation, Capital Reserve Leasing Corporation and CIT Corporation; that the complaint, and each claim therein, be dismissed as to those defendants and each of them, their costs of suit; and

IT IS FURTHER ORDERED AND ADJUDGED

with respect to the counterclaims:

(1) That Security Pacific National Bank recover of counter-defendants, and eACH OF THEM, THE PRINCIPAL SUM OF $63,054, plus interest through the date of judgment in the sum of $20,368 and at the legal rate thereafter ad costs, including reasonable attorneys' fees, of $48,464;

(2) That Capital Reserve Leasing Corporation recover of counter-defendants, and each of them, the principal sum of $7,396, plus interest through the date of judgment in the sum of $4,053 and at the legal rate thereafter and costs, including reasonable attorneys' fees, of $14,367.

IT IS FURTHERED ORDERED AND ADJUDGED that this Amended Judgment shall be deemed entered effective June 23, 1981, nunc pro tunc, and supersedes the judgment between

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the parties originally entered on that date.

Dated at San Francisco, California this 18th day of September, 1981.

OWEN E. WOODRUFF, JR.
United States Magistrate

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Office - Supreme Court, U.S.
FILED
MAY 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1684

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

SERGIUS BRYNER and FRANCIS BRYNER, et al.
Petitioners,

vs.

SECURITY PACIFIC NATIONAL BANK, COMMERCIAL BANK OF SAN FRANCISCO, CAPITAL RESERVE LEASING CORPORATION, C.I.T. CORPORATION and LEASCO CAPITAL EQUIPMENT CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 83-1684

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

SERGIUS BRYNER and FRANCIS BRYNER, et al.
Petitioners,

VS.

SECURITY PACIFIC NATIONAL BANK, COMMERCIAL BANK OF SAN FRANCISCO, CAPITAL RESERVE LEASING CORPORATION, C.I.T. CORPORATION and LEASCO CAPITAL EQUIPMENT CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Security Pacific National Bank, Commercial Bank of San Francisco, Capital Reserve Leasing Corporation, C.I.T. Corporation and Leasco Capital Equipment Corporation, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's unpublished memorandum disposition of this case.

Having failed after a ten-month jury trial and a lengthy appeal to convince either the jury, the trial court or any of the judges of the Court of Appeals, petitioners present six issues for review. In fact, none of those issues qualifies

for review under Rule 17, Supreme Court Rules. With the exception of the first question, concerning the constitutionality of the Magistrate's Act, 28 U.S.C. § 636(c), each of the issues turns upon facts which have been found in favor of respondents by the jury, and upheld by both the trial judge and the Court of Appeals. None of the issues presented by petitioners involves a conflict between the circuits; none requires the exercise of this Court's supervisory powers, and none presents an issue of overriding importance worthy of the limited resources of this Court. The petition should be swiftly denied.

STATEMENT OF THE CASE

Petitioners have entirely ignored the rule that a reviewing court must construe the evidence in the light most favorable to the prevailing party, and instead have given an entirely one-sided version of the disputed evidence. Respondents will refrain from a lengthy review of the voluminous record produced during the course of the ten-month trial, which involved dozens of witnesses, over twenty thousand pages of transcript and thousands of exhibits. We shall briefly summarize the evidence supporting the judgments and findings below.

History of the Proceedings

The case involved more than 30 California professional and business persons who invested in a Texas oil and gas tax shelter program. The investments and related equipment were largely financed by personal unsecured bank loans and equipment leases, generally co-signed or guaranteed by the investors' spouses. The petitioners (hereinafter "investors") decided that the tax shelter program

was fraudulent and filed suit against the promoters and operators of the program, as well as against the respondent banks and leasing companies (referred to collectively as the "lenders"). The investors also stopped making their monthly loan and lease payments and the lenders therefore counterclaimed for collection on the promissory notes and equipment leases.

The parties consented in writing to have the consolidated cases referred to a United States Magistrate, who then severed the actions filed by three of the investors for preliminary trial as a "test case." CR871. The jury in that case rendered verdicts in favor of the only lender involved (Security Pacific National Bank), both as to the claims by the investors of securities fraud, common law fraud and breach of fiduciary duty, as well as on the Bank's collection counterclaims. (Appellees' Supplemental Excerpt of Record ("S/ER") 2, 3. The judgments in the Bank's favor were affirmed on appeal by the Ninth Circuit, and that case has been concluded. *Hutchins v. Freeman,* No. 80-4483 (9th Cir. 1981).

After the trial of the test case, the parties to the remaining consolidated cases reconfirmed their consent to have the cases referred to the Magistrate. CR1131. The claims of the remaining investors were tried to a new jury over a ten-month period. The jury rendered a lengthy special verdict as to each investor, separately stating its findings as to each defendant, each claim, each defense and each counterclaim. S/ER16.

The jury flatly rejected the investors' claim that the banks had become "sellers" of unregistered securities in violation of § 12(1) of the Securities Act of 1933 (15 U.S.C. § 77*l*(1)),

notwithstanding the extremely liberal jury instructions given on the issue in precisely the form proposed by the investors. S/ER14, Instr. 33,36. The trial judge and the Ninth Circuit upheld this finding, and the investors have not raised it in the petition. The jury also rejected the investors' claims of state and federal securities fraud, common law fraud and negligence against the lenders, as well as identical affirmative defenses interposed by the investors to the collection counterclaims. S/ER16. The jury did award verdicts to three investors against the banks based on claims for breach of fiduciary duty, but rejected similar claims (and defenses) raised by the other 30 investors. *Id.* The Magistrate denied the investors' motions for judgment notwithstanding the verdict (Appendix to Petition for Writ of Certiorari ("App.") 1) and awarded attorneys' fees to the lenders pursuant to their written contract provisions. App. 8-10.

The investors appealed to the Ninth Circuit on some 23 separate grounds. On the eve of oral argument, more than two years after conclusion of trial, the investors for the first time questioned the constitutionality of the reference to the Magistrate. In an unpublished memorandum, the Ninth Circuit rejected the investors' other contentions on appeal and affirmed the judgments, while reserving decision on the Magistrate question. App.4. The en banc panel of the Ninth Circuit subsequently upheld the Magistrate's Act in *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984), whereupon the panel in this case summarily rejected the investors' constitutional challenge in an unpublished order. App.5. The investors' petition followed.

Relationship of the Lenders to the Investment Program

Plaintiffs characterize the case as involving "loans prearranged by the promoters" whereby the banks "provided capitalization for Texas operators" through "earmarked loan proceeds" which financed the "unlawful sale of unregistered securities" (Pet. 6-7 & 25). The jurors, the trial judge and the Court of Appeals all rejected this argument.

The evidence showed that the banks made ordinary commercial loans only to individuals who qualified on the basis of their personal income and assets, without regard to projected investment returns or tax benefits. RT16290-92, 18224-25. The banks never agreed to make any loans without a full credit review (RT16743, 17482-83, 17511) and turned down applicants who did not meet their normal credit standards. RT14701, 16080, 17475, 17483.

The banks did not promote or solicit for the investment program. RT11692, 16744, 17501. Indeed, they routinely advised the investors that the loans were being based on their own personal credit, that the banks did not endorse the investment program and that repayment would be required regardless of the results of the investments. RT15854, 16142, 17481-84, 17542, 18666-67. There was substantial evidence that investors did not rely upon the banks in deciding to invest. RT989, 3370, 4945, 5874.

The banks did not know or attempt to determine whether the investment offerings required state or federal securities registration, whether, in fact, they were so registered, or whether they were being properly offered. RT15054-55, 17042-43. There was uncontradicted expert testimony that banks do not customarily make such inquiries (RT19233) and that the loans here were ordinary commercial loans

which complied with normal credit standards. RT19154-55, 19233, 19263-64, 19490, 19536.

In short, the evidence amply supported the jury's explicit findings that the lenders committed no fraud and did not conspire with the investment promoters. S/ER16.

SUMMARY OF ARGUMENT

None of the six questions raised by the investors qualifies for review under the standards set forth in Rule 17, Supreme Court Rules. The disposition of the questions by the Ninth Circuit is fully consistent with applicable authorities and the unpublished memorandum creates no conflict or uncertainty requiring this Court's intervention.

The constitutionality of the Magistrate's Act, 28 U.S.C. § 636(c), has properly been upheld by the First, Second, Third and Ninth Circuits, on the basis that federal magistrates are appointed and supervised by Article III judges and because the parties have voluntarily waived any personal right to trial before a District Judge. Moreover, the unpublished order of the Court of Appeals in this case relies on prior authority without analyzing the issue, and thus provides an unsatisfactory vehicle for review.

Each of the remaining questions turns largely upon factual findings by the jury or the exercise of broad discretion by the trial court, based upon conflicting and disputed evidence. This Court has on numerous occasions noted its reluctance to disturb factual determinations in which both the District Court and Court of Appeals have concurred. See *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 46 n.7 (1979) ("we . . . are unwilling to substitute our judgment for that of the jury,

District Court and Court of Appeals on this essentially evidentiary question").

In attempting to address these issues, the Court would find itself adrift in the sea of conflicting testimony, exhibits and arguments produced during the course of a ten-month jury trial. The conclusions reached by the jury, the trial judge and the unanimous panel for the Court of Appeal should be allowed to stand.

ARGUMENT

Question 1: There is no good reason for this Court to address the constitutionality of 28 U.S.C. § 626(c)

Following the en banc affirmance of 28 U.S.C. § 636(c) in *Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) the panel hearing this case summarily rejected the investors' eleventh hour challenge to the judgments on that ground. App.28. As the investors themselves point out, the First, Second and Third Circuits are in accord with *Pacemaker* and have likewise upheld the constitutionality of § 636(c). See Pet.29,n.4. There is no conflict between the circuits on this point, nor any reason for this Court to review their conclusion.

The *Pacemaker* majority concluded that § 636(c) was constitutional because the control by Article III judges over the appointment of magistrates and references of cases to them satisfies the institutional concerns of Article III (725 F.2d at 544-46), while the consent of the parties validly waives any personal protection accorded by the Article. Id. at 542-43. The Court of Appeals rejected the argument that by consenting to the reference the parties were impermissibly conferring subject matter jurisdiction over the case,

since the reference did not expand federal jurisdiction to encompass new controversies but only permitted its exercise in a different manner. Id. at 543.

The Second and Third Circuits have also thoroughly analyzed the issue and come to the same conclusion. *Collins v. Foreman*, ... F.2d ....., No. 83-7938 (2d Cir. Feb. 22, 1984) (available on Lexis Genfed Library); *Wharton-Thomas v. United States*, 721 F.2d 922 (3d Cir. 1983). The First Circuit has followed *Wharton-Thomas*. *Goldstein v. Kelleher*, ... F.2d ....., No. 83-1411 (1st Cir. Feb. 29, 1984) (available on Lexis Genfed Library). Several commentators have also reached the same conclusion. *See Wharton-Thomas, supra*, 721 F.2d at 930 n.11.

The control exercised by Article III judges and explicit consent required of the parties serve to distinguish these cases from the authorities cited in the petition. Indeed, in this case the investors *twice* consented in writing to the reference, raised no challenge to it until the eve of oral argument on the appeal, and have no basis to rescind that waiver. The question has been exhaustively, unanimously and correctly resolved by the circuits. There is no reason to review it in this case.

Question 2: The trial court acted within its discretion in the award of attorneys' fees and the investors were not denied due process

The investors were indebted to the lenders on various promissory notes and equipment leases which contained clauses providing for the recovery of attorneys' fees and costs incurred in the enforcement of the obligations. S/ER29, 30, 31, 37, 38. The assigned magistrate presided

over numerous discovery motions, pretrial proceedings and trial, had extensive first-hand experience with the efforts and abilities of counsel, received complete accountings of their hours and hourly rates (S/ER20-22) and had ample information upon which to base the fee awards.

The investors not only asserted affirmative claims against the lenders based upon a variety of federal and state claims, but also raised similar assertions as affirmative defenses to the collection counterclaims by the lenders. Thus, the Ninth Circuit concluded that the lenders had to successfully defend against all of the investors' claims, including claims under the federal securities laws, in order to enforce their promissory notes and leases. App.28-29. It therefore upheld the trial court's discretion in awarding attorneys' fees without any apportionment between defense of the investors' affirmative claims and defeat of their identical affirmative defenses. Id. *See Wagner v. Benson*, 101 Cal.App.3d 27 (1980).

California law clearly authorizes the award of attorneys' fees pursuant to a contract between the parties. Cal. Civ. Code § 1717. The investors now argue that this rule must be compromised or disregarded whenever federal claims are asserted in an attempt to avoid the contract. Pet.37. They argue further that the trial court should have conducted an evidentiary hearing and tried to ascertain the intent of the parties as to the meaning of the fee clauses when they executed the promissory notes and leases. Pet.39-42.

The award of attorneys' fees pursuant to contract is properly determined on the basis of post-trial motions. *Matter of Sparkman*, 703 F.2d 1097, 1100 (9th Cir. 1983).

Rule 43(e), F.R.Civ.P., recognizes that motions will ordinarily be decided on the basis of facts presented by affidavit, unless the trial court elects to take oral testimony. The Northern District of California has promulgated Local Rule 220-7, providing that factual contentions in opposition to a motion "shall be supported by affidavits or declarations" and that "[n]o oral testimony will be received in connection with any motion . . . unless otherwise ordered by the assigned judge." L.R. 220-7 (effective as of March 1, 1981). Thus, a leading commentary notes that the hearing of oral testimony is discretionary and that "[m]otions are usually decided on the papers . . . ." 9 Wright & Miller, *Federal Practice & Procedure* § 2416 at 378 (1971).

Rule 78, F.R.Civ.P., further authorizes the district courts to make rules providing for the submission and determination of motions without oral argument. Pursuant to that authorization the Northern District has promulgated Local Rule 220-1 permitting the trial courts to dispense with oral argument. Such a rule does not violate due process. *Morrow v. Topping*, 437 F.2d 115 (9th Cir. 1971).

Thus, it was fully within the discretion of the trial court to decide all post-trial attorneys' fee motions on the declarations, exhibits and memoranda submitted. Moreover, even if an evidentiary hearing were required under certain circumstances the investors waived any right to such a hearing this case.

In the first place, the investors' counsel actually submitted their own very substantial fee applications on behalf of the three investors who had been awarded judgments

against the banks. S/ER23. Investor Melbostad applied for an award of $22,939 in fees and costs against Commercial Bank, even though he was unsuccessful in his claims against the other lenders. Id. The two Purviance cousins, who were represented by another attorney, *each* sought $83,905 in fees and costs from the banks—much more than any of the lenders sought from an individual investor. CR1880-82. The investors' submission of these substantial fee requests certainly belies their present argument that the fee clauses had to be interpreted in a narrow manner or that inquiry was required concerning the parties' intent.

Furthermore, the investors failed to submit counter-declarations or other evidentiary material in opposition to the fee motions. S/ER24. As this Court recently noted, a party waives any right to an evidentiary hearing on an attorneys' fee application by failing to submit "*evidence* challenging the accuracy and reasonableness of the hours charged . . . or the facts asserted on the affidavits submitted" in support of the fee application. *Blum v. Stenson,* ..... U.S. ....., 57 U.S.L.W. 4377, 4378 n.5 (1984) (emphasis added). See also *Shakey's Inc. v. Covalt,* 704 F.2d 426, 435 (9th Cir. 1983) ("we have previously affirmed attorneys' fee awards supported by ample evidence without requiring an evidentiary hearing").

The investors did not properly raise any disputed issues of fact and waived any right to an evidentiary hearing. Indeed, to this day they have never presented factual opposition to the fee applications, only legal and policy arguments. There is simply no proper basis to review the trial court's discretionary award of fees in this case.

Question 3: The jury returned uncoerced verdicts and investors waived any objection to the trial court's instructions

The investors contend that the trial court demanded the numerical division of the jury in violation of *Brasfield v. United States*, 272 U.S. 448, 450 (1926). But in fact the jury volunteered its numerical division; the investors failed to object to the inquiry and later ratified it; and any error was harmless.

The Ninth Circuit concluded that "the judge did not directly ask for the numerical division" of the jury (App. 15) and that the split was volunteered by the jury foreman. RT21945, 21959. The *Brasfield* rule does not apply in those circumstances. *Bowen v. United States*, 153 F.2d 747, 752 (8th Cir.), *cert. denied*, 328 U.S. 835 (1946); *United States v. Williams*, 444 F.2d 108 (9th Cir. 1971).

Furthermore, as noted by the Ninth Circuit, the investors did not object to the trial court's inquiry and therefore waived any objection. App.26. See *Chicago, Rock Island & Pacific Railroad Co. v. Hugh Breeding, Inc.*, 247 F.2d 217, 227 (10th Cir. 1957); *Maloney v. Tunnell*, 218 F.2d 705, 709-11 (3d Cir. 1955). Indeed, the investors explicitly told the court that they endorsed the inquiry (RT21976) and cannot now complain of it. See *Marsh v. Cupp*, 536 F.2d 1287, 1291 (9th Cir. 1976).

Finally, the *Brasfield* rule is inapplicable to civil cases. *Chicago, Rock Island & Pacific R.R. Co. v. Hugh Breeding, Inc.*, 247 F.2d 217, 227 (10th Cir. 1957); *Maloney v. Tunnell*, 218 F.2d 705, 709-11 (3d Cir. 1955).

The investors further complain of the trial judge's modified *Allen* charge in which he instructed the jury, among other things, to "listen carefully to the opinion of others ... and try to come up with a verdict which of course must be unanimous" and admonished to each juror not to "surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of other jurors or for the mere purpose of returning a verdict." RT21947-48. He also cautioned that no verdict should be reached in violation of a juror's "individual judgment . . . and conscience." RT21949-50.

Such an instruction has never been disapproved by this Court, particularly in a civil case, and was given in the exact form suggested in Devitt and Blackmar, Federal Jury Practice § 18.14 (3d Ed. 1977). The Ninth Circuit found that it was not coercive and that the investors had made no objection at trial, as the cases require. App.26. See *Marsh*, supra, 536 F.2d at 1291-92; *Sanders v. United States*, 415 F.2d 621, 631 (5th Cir. 1969).

After reading the *Allen* instruction the court reconvened to respond to a note received from the jury shortly thereafter, which stated:

> We find one of our group to be domineering, irascible, contentious, arrogant and digressive to such a degree that intelligent discussion is impossible. We request advice on handling this situation.
> (RT21959).

Faced with this serious problem the trial judge stated that the jurors should "exchange views, exchange thoughts and ideas, . . . listen carefully to the opinion of others",

and "after there has been calm, deliberate, carefully reasoned discussion of the evidence, you must take your vote and try to come up with a verdict which of course must be unanimous." RT21960. The investors voiced no objection at the time. RT21962-67.

When deliberations were reconvened a hearing was held outside the jury's presence to discuss proposed further instructions to assist the jury. The investors proposed a lengthy instruction which reiterated their arguments about the legal issues and told the jury the process it should follow in its deliberations. S/ER32. The investors' proposed instruction did not address the coercion problem and, indeed, *repeated* those portions of the *Allen* charge designed to encourage an isolated juror to reassess his position. *Id.* The investors declined to support an instruction proposed by the lenders which sought to minimize any possible coercive effect of the previous charge by reiterating the individual jurors' responsibility to agree on a verdict only if their consciences permitted it. S/ER33; RT21971-73.

The Ninth Circuit properly found that the investors had waived any objection and that there was no coercion by the trial court under the circumstances. App.26. That determination was correct and does not qualify for review.

Question 4: The jury verdict was unanimous and further inquiry by the trial court was unnecessary

The investors object to the unanimity of the verdict because one juror, upon being polled about his vote, initially stated that "in order to get a unanimous vote I voted yes." RT21982. The trial court properly informed

the juror that he must give either a yes or no answer, whereupon the juror agreed unequivocally with the verdicts. RT21985.

The Ninth Circuit held that the juror's affidavit trying to explain his vote was not admissible to impeach the verdict and that his affirmance of the verdict in open court was binding. App.26. This was clearly a proper conclusion. *See* Rule 606(b) Fed.R.Evid.; *Grace Lines, Inc. v. Motley,* 439 F.2d 1028, 1031-32 (2d Cir. 1971) (juror's statement that she voted for verdict only because she understood it had to be unanimous did not impeach verdict); *Roy v. Star Chopper, Inc.,* 584 F.2d 1124, 1136 (1st Cir. 1978) (it was proper for trial court to put equivocal juror to a yes or no test as to the verdict); ABA Standards Relating to Trial By Jury (1968) (any volunteered explanation by juror of his agreement with verdict should be disregarded).

The trial court could only have interfered with the integrity of the jury process and caused confusion by interrogating the juror on the basis and meaning of his remarks. The matter was handled correctly and should not be reviewed.

Question 5: Both the jury and the trial court rejected the contention that Security Pacific had wilfully destroyed evidence

The investors neglect to point out that their theories regarding destruction of evidence by Security Pacific National Bank were soundly rejected by the jury and the trial judge, and were not considered significant by the Court of Appeals. Notwithstanding this procedural history, the investors ignore the standards for appellate review

and continue to assert their fanciful interpretation of the disputed evidentiary record. The question turns entirely on findings of fact supported by the evidence, and does not qualify for review.

As shown by the evidence it was the standard practice of Security Pacific's Special Assets Department to consolidate documents from various other parts of the Bank into a single credit file whenever a problem loan was referred for handling. RT17070, 17104-05. The reconstruction was apparent to investors' counsel, who had the opportunity to review the files and to take full discovery of the custodian. RT16099, 19766-87, 17087-123. The Bank did not destroy or throw away documents when reorganizing the files (RT17015), although some older files were routinely destroyed after the loans had been paid off. RT17105-06. As it was, the investors had dozens of complete loan files which they offered in evidence for the jury's perusal, and the Bank's independent expert called them the most complete files of their kind that he had ever seen in his 40 years of banking. RT19122-44, 19167-68.

The only "original" documents omitted from the files were certain loan reports which had been sent to the Bank's headquarters for review and had apparently been routinely destroyed. RT17091-93. However this did not "hide" the facts or deceive anyone since identical photocopies were available in the files and were offered in evidence. *See e.g.*, Pl.Ex.67A80; 76A2. The only "whiting out, masking and . . . paste-ups" (pet.11) were minor changes in status routinely entered on existing reports rather than recreating an entire new form from scratch. RT15493.

Investors counsel strenuously argued the "destruction of documents" issue to the jury (RT20370-87) and even requested and received an instruction permitting adverse inferences to be drawn against a party shown to have destroyed or concealed evidence. S/ER14, Instr.29A. If the jury had believed that Security Pacific willfully destroyed and altered documents in order to cover up its participation in a fraudulent scheme, the Bank would have been found liable for its fraud pursuant to the special jury verdicts. But the jury rejected the claims of fraud. S/ER16.

Furthermore, the investors raised the same argument in opposition to the Bank's application for attorneys' fees. S/ER24. The trial judge, who sat through all of the evidence on the issue and was able to judge the credibility of the bank officers involved, explicitly held that there had been no showing of misconduct by the Bank. ER78. The Ninth Circuit did not see fit to discuss the issue since the question of whether a party has engaged in misconduct will not be reviewed absent an abuse of discretion. See, *Wilson v. Thompson,* 638 F.2d 801, 804 (5th Cir. 1981).

Since both the jury and the trial judge concluded on a disputed record that there was no misconduct, and since that conclusion was amply supported by the record, there was little for the Ninth Circuit to add or for this Court to review.

Question 6: The trial court properly directed verdict on the investors' claims and defenses under the National Bank Act

The investors contend that it was error for the trial court to direct verdict in favor of the banks on the investors' affirmative defenses to the banks' collection counterclaims,

which defenses alleged violation of the Glass-Steagall Act, 12 U.S.C. §§ 24, 378. This contention fails for two reasons: (1) The jury found, and the Ninth Circuit affirmed, that the banks had not been engaged in the sale of the securities, therefore there was no violation of the Glass-Steagall Act (which finding is not even presented for review); and (2) the trial court held, and the Ninth Circuit affirmed, that even assuming there were violations of the Act, the investors had no standing to assert any such violations as defenses to collection of their notes.

In pertinent part, the Glass-Steagall Act (codified as part of the National Bank Act) provides that national banks may not deal in securities:

> The business of dealing in securities and stock by the Association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the Association shall not underwrite any issue of securities or stock . . . .
>
> 12 U.S.C. § 24, Seventh.

The jury explicitly found and the Ninth Circuit affirmed that the banks in this case were not engaged in the offer or sale of the tax shelter securities to the investors. App.7-13. The investors do not request review of that holding, which was based upon substantial evidence. Thus, even if the investors' interpretation of the Glass-Steagall Act was correct, the banks clearly did not engage in prohibited conduct and the grant of directed verdict by the trial court was, at most, harmless error.

Furthermore, the Ninth Circuit relied upon an unbroken line of authority that individual debtors have no standing to assert claims or defenses based upon violations of the

National Bank Act. App.13-16. See *Thompson v. Saint Nicholas Nat'l Bank,* 146 U.S. 240, 250-51 (1892); *Union Nat. Bank of St. Louis v. Matthews,* 98 U.S. 621, 629 (1879); *Federal Deposit Ins. Corp. v. Freudenfeld,* 492 F.Supp. 763 (E.D.Wis.1980). See also *Noel Estate, Inc. v. Commercial Nat. Bank in Shreveport,* 232 F.2d 483, 485 (5th Cir. 1956). These authorities correctly recognize that the intent and purpose of the National Bank Act (including the Glass-Steagall Act) was to protect the solvency of national banks, rather than to create defenses to collection of their notes. There is no basis to review or overturn that well-established principle.

CONCLUSION

None of the questions urged by the investors is deserving of review. The petition for writ of certiorari should be denied.

Dated: May 14, 1984

Respectfully submitted,

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PETITIONERS' REPLY BRIEF

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.....1, 2, 3, 5

1. Exercise of Article III powers by a magistrate. Respondents' opposition emphasizes the illusory feature of 28 U.S.C. §636(c), i.e., "control by Article III judges" over a magistrate's exercise of judicial power. Such "control", however, is not automatic and to operate at all must be invoked or exercised sua sponte. In practical terms, "control" is non-existent. Moreover, appellate review does not satisfy "the institutional concerns of Article III". The standard of review for a judgment entered by a magistrate is the same as for judgments entered by Article III judges and does not purport to constitute trial de novo or the equivalent of proceedings essential to the entry of judgment. This Court holds that constitutional requirements for the exercise of judicial power must be met at all stages of adjudication. Northern Pipeline v. Marathon Pipeline, 458 U.S. 50, 71 (1982).

Article III demands are satisfied only when "the ultimate decision is made by the district court." United States v. Raddatz, 447 U.S. 667, 683 (1980).

Here, as in the two other certiorari petitions currently pending before the Court,[1/] "the ultimate decision" was made by a magistrate lacking the essential attributes of an Article III judge. Northern Pipeline, supra, 458 U.S. 59. This Court has concluded that it is "the inexorable command" of Article III that "the judicial power of the United States must be exercised by courts having the attributes prescribed in Article III, i.e., life tenure and fixed compensation. Northern Pipeline, supra, 458 U.S. at 58.

28 U.S.C. §636(c) makes pretensions

1/ Collins v. Foreman, certiorari 83-1616; Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., certiorari 83-1873. We are informed that a fourth petition raising this issue is to be filed in Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 2/29/84).

to constitutional adequacy by providing for litigant consent and allowing for district judge intervention. Yet, these provisions are makeweight, not meaningful in the real life environment of the district court where subtle pressures exist to consent, and district judge participation is unlikely. The "consent" and "control" provisions lack substance in a constitutional context and, as the instant case illustrates, the judicial power of the United States, once exercised by a magistrate in the manner allowed by Section 636(c), is effectively lost to the district court. If meaningful control by an Article III judge were possible, Section 636(c) would not have been enacted. It is an expedient.

As noted in our petition, the issue is recurrent. There are now pending in this Court three certiorari petitions addressing this identical issue: Collins

v. Foreman, certiorari 83-1616; Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., certiorari 83-1873; and the instant petition.

2. The magistrate's award of attorneys fees without a hearing ignores controlling principles of California law, federal policy and due process. [A.] Respondents' opposition misconstrues California law. The California Supreme Court considers public policy when interpreting a fee clause in a contract. Ecco-Phoenix Electric Corp. v. Howard J. White, Inc., 1 Cal.3d 266, 272 (1969). In Ecco-Phoenix, the court looked at "the oppressive nature of a literal interpretation of the [fee] clause." 1 Cal.3d 272. See also International Industries, Inc. v. Olen, 21 Cal.3d 218 (1978) giving effect to equitable principles and public policy considerations in the judicial interpretation of fee clauses.

The magistrate's orders and the Ninth Circuit memorandum ignore the California Supreme Court and rely upon a decision of an intermediate appellate court as the source of California law on this subject. It is not. The case, Wagner v. Benson, 101 Cal.App.3d 27 (1980), also ignores the California Supreme Court, but is cited by respondents, the magistrate and the Ninth Circuit to justify the error that has resulted. Wagner is an aberration when applied to these facts. At best, the case is an incomplete reflection of California law. Wagner does not cite the controlling California cases relating to interpretation of attorneys fee contracts. Ecco-Phoenix, supra, and International Industries, supra. Nor does Wagner refer to California Civil Code §1636 requiring that all contracts be interpreted in accord with the mutual intention of the parties at time of contracting.

The trial court, respondents and the Ninth Circuit ignore Sciarrotta v. Teeford Construction Co., 110 Cal.App.3d 444, 451 (1980) decided after Wagner and which is contra to Wagner. (See Petition.)

Similarly, respondents, the magistrate and the Ninth Circuit ignore national policy. This Court has asserted that it is "national policy" to "minimize the cost of litigation" Farmer v. Arabian American Oil Co., 379 U.S. 227, 234 (1964), and that allowance of all costs of litigation is appropriate "only in exceptional cases and for dominating reasons of justice." Sprague v. Ticonic National Bank, 307 U.S. 161, 167 (1939).

The Ninth Circuit ignores its holding in United States v. Mountain State Construction Co., 558 F.2d 259, 263 (9th Cir. 1978), requiring a trial court to exercise discretion in accord with equitable principles when interpreting a fee clause in a

contract. More importantly, vis-a-vis, national policy, the magistrate and the Ninth Circuit ignore the fact that the securities acts, which were central to petitioners claims against respondents, do not permit an award of attorneys fees, absent a show of bad faith. Junker v. Crory, 640 F.2d 1349, 1364-5 (5th Cir. 1981).

[B.] A hearing should have been held. Respondents speculate that even if a hearing were conducted, petitioners would not have prevailed because no disputed issues of fact had been raised. The fact is that petitioners did serve post-trial deposition subpoenas duces tecum for respondents' attorneys fee records (CR 1862-64) and filed written opposition to respondents' fee applications. (ER 55, 65). Moreover, petitioners requested a hearing and the magistrate's orders expressly promised one. Substantial property rights

were involved and a hearing should have been held.

Respondents opposition complains that petitioners have presented "only legal and policy arguments", rather than "factual opposition to the fee applications". Op.Br.11. The refusal of the magistrate to conduct a hearing and the Ninth Circuit to consider petitioners' "legal and policy arguments", or to order a hearing, has kept the evidentiary facts waiting in the wings.

3. Announcement of numerical division was a product of judicial inquiry. On May 13, 1981, without notice to, or advice of, counsel, the magistrate called the jury into the courtroom and said:

> "I am just trying to get an idea how we stand in numbers...Is there a general posture of the jury that there are so many voting one way and so many voting another on all issues...do we have variations?...Two agree on this one, but the next time down, four agree? How does that work?" RT 21945.

The jury foreman's response to this explicit request for numerical division was: "In every case, four jurors agree on everything." RT 21945.

Thus, the jury did not "volunteer". Numerical division was specifically asked for. Only a failure to examine closely the record or undue reliance upon the respondents' briefs could have led the Ninth Circuit to conclude that "the judge did not directly ask for numerical division". This distortion of the record is the fruit of respondents' effort to avoid Ninth Circuit holdings in United States v. Noah, 594 F.2d 1303, 1304 (9th Cir. 1979), and of this Court in Brasfield v. United States, 272 U.S. 448, 450 (1926).

The so-called "waiver" that respondents are talking about is found in an argument made by one of petitioners' attorneys five days after the incidents of jury coercion complained of here, and in

another context. In colloquy, the magistrate "rejected further assistance to the court" to see what the jury would do "without further error by the court, error that is alleged to occur no matter what I do." RT 21977. The magistrate did not consider the "error" waived and there was no consent to, or waiver of, what occurred.

Finally, respondents cite two cases for the proposition that "the Brasfield rule is inapplicable to civil cases." Op.Br.12.[2/] Both are inapposite and one expressly supports the proposition that the Brasfield rule does apply to civil cases. Chicago, Rock Island, a civil case, does not cite Brasfield but does follow the Brasfield rule. The Tenth Circuit holds that the trial court's inquiry

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2/ Chicago, Rock Island & Pacific Rr. Co. v. Hugh Breeding, Inc., 247 F.2d 217, 227 (10th Cir. 1957); Maloney v. Tunnell, 218 F.2d 705, 709-11 (3rd Cir. 1955).

about numerical division, together with the supplemental instructions, "was calculated to wrongfully coerce the jury and...the inquiry should not have been made." 247 F.2d at 227.

Nor does the second case, Maloney, hold that the Brasfield rule is inapplicable to civil cases. Rather, the Third Circuit concludes that there was no coercion in that case "by any stretch of the imagination." 218 F.2d 711.

4. The jury verdict was not unanimous. When a juror answers a poll saying "In order to get a unanimous vote I voted yes" (RT 21982), and the trial judge responds by telling the juror he must say "yes" or "no", it is obvious that the juror is going to say "yes", just as he did in the jury room and for the same reasons.

THE COURT: Either it is your verdict, or it is not your verdict, and it must be an unqualified yes or no.

JUROR: I gave it that way, sir.

THE COURT: Well, what is your verdict, sir; yes or no?

JUROR: Yes.

THE COURT: All right, thank you. (RT 21985)

Three requests were made by petitioners' attorney for clarification. RT 21984, 21985, 21986. The jury was discharged over objection of petitioners' counsel. RT 21986. Respondents rely upon two cases, neither of which support their position. In Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971), the trial court did ask the juror for an explanation of her ambiguous answer. The Second Circuit says that evidence of coercion, combined with the juror's expression of uncertainty, would have supported the granting of a mistrial. The instant case is not one of uncoerced acquiescence, but rather a case in which a series of coercive events culminated in a non-unanimous verdict.

In Roy v. Star Chopper, Inc., 584 F.2d 1124 (1st Cir. 1978), the second case cited by respondents, the juror did not express doubt over the verdict, but said she would like to ask someone a question, whereupon the court told her to answer the question put to her. When she answered, the judge inquired as to whether his inquiry was "clear enough to you." 584 F.2d 1136. The First Circuit notes, quite consistently with petitioners' position here, that "it is the court's function to determine solely whether the verdict represents the juror's position..." 584 F.2d 1136.

That is all petitioners asked the magistrate to do in the instant case, not to inquire into the reasoning process or motivation behind the verdict. The purpose of the affidavit was not "to impeach the verdict", but to determine whether the verdict represented the juror's position. An affidavit of a juror is admissible to

show either the true verdict or that no verdict was reached at all. Fox v. United States, 417 F.2d 84, 89 (2nd Cir. 1969).

5. The issues raised by Federal Rule of Civil Procedure 60(b)(3) were not decided by the jury and the magistrate did not consider those issues, except in the context of attorneys fees. The extent of the alteration and destruction of evidence did not begin to unravel until mid-trial. The issue presented was not for the jury at all and neither the magistrate nor the Ninth Circuit has fully considered those issues.

It is not "fanciful" (Op.Br.6) to say that the bank "reconstructed" its records and files when the bank admits that this is precisely what it did. It is hardly "fanciful" for petitioners to contend that originals of the banks' primary historical document were destroyed when the bank admits that all were destroyed. RT 17070.

These particular documents were central to the bank's defense that the transactions in question were "ordinary commercial loans". The documents, according to the bank's own testimony, "tell what actually happened" (RT 18237).

Respondent contends in opposition that the originals "had apparently been routinely destroyed." Op.Br.16. However, two bank officers testified that the originals should have been in the files produced in court. RT 15401, 16094. But, says the bank, this destruction "did not hide the facts or deceive anyone since identical photocopies were available in the files and were offered in evidence." Op.Br.16. Yet, as respondent acknowledged at trial it was a "everyday" practice to take these "identical photocopies" out of the file and to alter them (RT 15529-30), i.e., "photocopy a part of the CCR and complete the rest" and "cut and paste an

old CCR and make up a new one". If a change was desired, a bank officer would write something on a copy and give it to the secretary and she would type a new CCR: "If I desire to do that, that's exactly what I did, yes." RT 15604. It was historical revisionism and the date on the revised document would make it appear to be a copy of the original prepared contemporaneously with the event. Such "changes" could be made as long as two years after the original had been destroyed. RT 15604-5.

Since the photocopy would not disclose the "changes" or the "whiting out" or the "paste-up", the bank's assertion that these were "minor changes" and that they were not "recreating a new form from scratch" (Op.Br.16) should fall on deaf ears. The self-proclaimed "identical photocopies...available in the files and...offered in evidence"

(Op.Br.16) were, in fact, self-serving facsimiles, utilized by the bank to support its "ordinary commercial loan" defense at trial.[3/]

Respondents' argue that the Ninth Circuit did not discuss this issue because it was non-reviewable, absent an abuse of discretion. Op.Br.17. This is absurd. The issue was reviewable. The Ninth Circuit simply said that undiscussed issues, while not lacking in merit, were not pivotal. As we point out in our petition, the issue was pivotal and clearly not lacking in merit. It is an appropriate

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3/ A close reading of the two full paragraphs at page 16 of the opposition brief reveals the transparency of the bank's rejoinder. There was no way of knowing whether "the bank did not destroy or throw away documents when reorganizing the files" because the only thing left to discover was the reorganized file, the reorganization of which was concealed from plaintiffs. Further, the assertion that "identical photocopies of credit commitment reports were in the files, carefully avoids the admitted fact that these were not identical photocopies of originals, or if they were there was no original to compare them to.

subject for the exercise of this Court's supervisory powers. The fundamental facts are surprisingly undisputed, indisputable, and belatedly admitted.

6. The magistrate had no basis for directing a verdict on National Bank Act defenses hinged to bank conduct that undermined the purpose of the Glass-Steagall Act. Respondents concede that "the intent and purpose of the National Bank Act was to protect the solvency of national banks". Op.Br.19 The promiscuous granting of investment loans, particularly in energy-related fields such as oil and gas, is at the foot of numerous bank failures, most recently Continental Illinois, an event that adversely affected securities and bond markets. These events dramatize the need for enforcement of the provisions of the National Bank Act. Violations of the kind that occurred here, through the irresponsible use of bank cus-

tomers, as borrowers, to capitalize a fraudulent scheme, should not be rewarded.

Respondents' assertions to the contrary notwithstanding, the operative facts are undisputed and well documented and there is no requirement that they must fall within the ambit of seller liability under Section 12 of the 1933 Act in order to constitute a violation of Glass-Steagall.

CONCLUSION

Respondents' assert that "each of the issues turn upon facts which have been found in favor of respondents by the jury". Op.Br.2. Not so. Question 1 relating to the exercise of Article III powers by a magistrate was not a jury question. Question 2 relating to attorneys fees was not a jury issue and petitioners never had a hearing with respect to attorneys fees and non-statutory costs. Question 3 relates to the trial

court's handling of the jury and, by definition, does not turn upon facts decided by the jury. Question 4 involves jury unanimity and was not a jury question. Question 5 relates to Rule 60(b)(3) F.R.Civ.P., which was raised by post-trial motion and not submitted to the jury. Question 6 involves Glass-Steagall Act defenses which were taken from the jury by directed verdict.

Petitioners have eliminated issues that could cast this Court "adrift in a sea of conflicting testimony" (Op.Br.7), raising only those key issues that are crystallized by incontrovertible fact.

DATED: June 1, 1984.

Respectfully submitted,

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